


1954

Perpetuities and other Restraints: A Study of the Michigan Statutes and Decisions Relating to Perpetuities and Other Devices Which Fetter the Alienability of Property, Against the Background of the Laws of England and Other American Jurisdictions

William F. Frachter

Follow this and additional works at: http://repository.law.umich.edu/michigan_legal_studies

 Part of the [Common Law Commons](#), [Estates and Trusts Commons](#), [Family Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Frachter, William F. Perpetuities and other Restraints: A Study of the Michigan Statutes and Decisions Relating to Perpetuities and Other Devices Which Fetter the Alienability of Property, Against the Background of the Laws of England and Other American Jurisdictions. Ann Arbor: University of Michigan Law School, 1954

This Book is brought to you for free and open access by the Law School History and Publications at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Legal Studies Series by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

MICHIGAN LEGAL STUDIES



PERPETUITIES AND OTHER RESTRAINTS

PUBLISHED UNDER THE AUSPICES OF THE UNIVERSITY OF MICHIGAN LAW SCHOOL
(WHICH, HOWEVER, ASSUMES NO RESPONSIBILITY FOR THE VIEWS EXPRESSED) WITH
THE AID OF FUNDS DERIVED FROM GIFTS TO THE UNIVERSITY OF MICHIGAN BY
WILLIAM W. COOK

MICHIGAN LEGAL PUBLICATIONS

Hessel E. Yntema, Editor

MICHIGAN LEGAL STUDIES

DISCOVERY BEFORE TRIAL

George Ragland, Jr.

TORTS IN THE CONFLICT OF LAWS

Moffatt Hancock

THE AMENDING OF THE FEDERAL

CONSTITUTION

Lester B. Orfield

REVIEW OF ADMINISTRATIVE ACTS

Armin Uhler

THE PREVENTION OF REPEATED

CRIME

John Barker Waite

THE CONFLICT OF LAWS:

A COMPARATIVE STUDY

Three Volumes

Ernst Rabel

UNREPORTED OPINIONS OF THE

SUPREME COURT OF MICHIGAN

1836-1943

William Wirt Blume, *Editor*

PROBLEMS IN PROBATE LAW:

INCLUDING A MODEL PROBATE CODE

Lewis M. Simes and Paul E. Basye

SOVIET CIVIL LAW

Two Volumes

Vladimir Gsovski

SURVEY OF METROPOLITAN COURTS

DETROIT AREA

Maxine Boord Virtue

ADMINISTRATIVE AGENCIES

AND THE COURTS

Frank E. Cooper

OUR LEGAL SYSTEM AND HOW IT

OPERATES

Burke Shartel

RETROACTIVE LEGISLATION AFFECT-

ING INTERESTS IN LAND

John Scurlock

INTEGRATION OF PUBLIC UTILITY

HOLDING COMPANIES

Robert F. Ritchie

PERPETUITIES AND OTHER RESTRAINTS

William F. Fratcher

UNIVERSITY OF MICHIGAN PUBLICATIONS: LAW

TRANSACTIONS OF THE SUPREME

COURT OF THE TERRITORY OF

MICHIGAN 1805-1836

Six Volumes

William Wirt Blume, *Editor*

RATIFICATION OF THE TWENTY-FIRST

AMENDMENT TO THE CONSTITUTION

OF THE UNITED STATES

Everett S. Brown, *Compiler*

COOLEY LECTURES

THE CONSTITUTION AND SOCIO-

ECONOMIC CHANGE

Henry Rottschaefer

SOME PROBLEMS OF EQUITY

Zechariah Chafee, Jr.

OUR LEGAL SYSTEM AND HOW

IT OPERATES

Burke Shartel

(published in Michigan Legal
Studies)

SELECTED TOPICS ON THE LAW

OF TORTS

William L. Prosser

A COMMON LAWYER LOOKS AT THE

CIVIL LAW

Frederick H. Lawson

SUMMER INSTITUTE LECTURES

THE CONFLICT OF LAWS AND INTER-

NATIONAL CONTRACTS: 1949

THE LAW AND LABOR-MANAGEMENT

RELATIONS: 1950

TAXATION OF BUSINESS ENTERPRISE:

1951

ATOMIC ENERGY—INDUSTRIAL AND

LEGAL PROBLEMS: 1952

FEDERAL ANTITRUST LAWS: 1953

LEGISLATIVE RESEARCH PUBLICATIONS

CURRENT TRENDS IN STATE

LEGISLATION: 1952

PERPETUITIES AND OTHER RESTRAINTS

A Study of the Michigan Statutes and Decisions Relating
to Perpetuities and Other Devices Which Fetter the
Alienability of Property, Against the Background of the
Laws of England and Other American Jurisdictions

by

WILLIAM F. FRATCHER

Foreword

by

LEWIS M. SIMES

Ann Arbor

UNIVERSITY OF MICHIGAN LAW SCHOOL

1954

COPYRIGHT, 1955
BY
UNIVERSITY OF MICHIGAN

*This work is dedicated
with respect and affection
to my father,
Vernon C. Fratcher, Esq.,
of the Detroit Bar.*

Foreword

THE subject of perpetuities is peculiarly appropriate for monographic treatment. Replete with intricate knots, which only history and precise logic can untangle, it presents to the general practitioner a quagmire of uncertainty, and causes him to seek the aid of the specialist. Yet from the standpoint of a writer, this subject requires the examination of a sufficiently limited body of source material to make the preparation of a treatise definitely less than a lifetime undertaking. Thus legal writers early chose this theme. Lewis on Perpetuities, the first English treatise, appeared in 1843, when the rule itself had hardly crystallized in all its aspects. Marsden's book on the same subject came out forty years later.

The classic treatises on this side of the Atlantic, both on restraints on alienation and the rule against perpetuities, are those of John Chipman Gray. His *Restraints on Alienation*, the first edition of which appeared in 1884, was primarily an argument against the decision of the Supreme Court of the United States in the case of *Nichols v. Eaton*, which approved the spendthrift trust. But the high quality of its scholarship fixed its character in the legal profession as a treatise rather than a brief. Gray's treatise on the rule against perpetuities, the first edition of which appeared in 1886, is known to every lawyer worthy of the name. Written in part to eliminate the confusion between rules as to restraints on alienation and the rule against perpetuities, the book so thoroughly taught its lesson that it has ceased to be regarded as a demonstration of the remoteness-of-vesting theory, and has become almost the embodiment of the rule itself.

The fourth and last edition of Gray's treatise was edited by his son, Mr. Roland Gray, and appeared in 1942. But monographic treatment of the American rule did not stop here. Thus, 588 pages of volume VI of the American Law of Property, published in 1952, are devoted to three excellent monographs: one by Professor W. Barton Leach and Mr. Owen Tudor on the common-law rule against perpetuities, one by Professor Horace Whiteside on statutory rules against perpetuities, and one by Professor Merrill Schnebly on restraints on alienation.

The question may then be asked: Why another monograph on Perpetuities and Other Restraints? The answer is not far to seek. Even a superficial examination of the treatises on the American law of these subjects is sufficient to demonstrate that no one treatise can deal exhaustively with the law of each state. Thus the treatises of Leach and Tudor and of Schnebly make no attempt to deal separately with the law of Michigan. And Whiteside's treatise disposes of the Michigan statutory law of perpetuities in about twenty-three pages. Yet Professor Fratcher finds it necessary to devote four chapters and 135 pages of his monograph to the Michigan statutory rules.

Indeed, in view of our constantly growing body of cases and statute law, it is believed that an increasingly fruitful type of legal research is that which concentrates on the law of a single jurisdiction. Not only does it provide a more precise statement of legal doctrines of one state than can be derived from more general treatises, but it also furnishes a unique basis for generalizations as to rules which are applicable in all jurisdictions. After all, general statements about the American common law, when in one sense there are in fact some forty-eight or more

American common-law systems, are not uniformly helpful.

Professor Fratcher has brought to bear on the preparation of his monograph the qualities needed to make it something more than a treatise on one facet of Michigan law. That he has made a thorough and exhaustive examination of all pertinent cases and statutes is evident. But he is also the legal historian. Major aspects of his subject are introduced with a delineation of the background of English and American legal history. If the English law of restraints on alienation prior to Magna Carta is necessary to an understanding of modern Michigan law, it is discussed. If the New York legislation of 1828 on perpetuities furnishes a background for the Michigan statutes of 1846, then a brief treatment of the New York legislation is included. Moreover, before entering upon a specialized discussion of a major area of Michigan common law, Professor Fratcher follows the general plan of summarizing the pertinent English common law.

That the Michigan lawyer, vexed with a problem in the law of perpetuities and restraints, will find the last word on it in this treatise, goes without saying. But the book also has significance outside Michigan. Just as a careful scholarly study by a psychologist of the conduct of twenty-five white mice in a maze may be significant as to the reactions of all white mice and even as to human beings, so a study of perpetuities and other restraints based upon Michigan source material will have significance wherever Anglo-American law is known and practiced.

LEWIS M. SIMES

Ann Arbor, Michigan

Preface

"I fetter thee with brazen bonds that none can loose."
—Aeschylus, *Prometheus Bound*

THE central theme of this study comprises the judicial and legislative rules developed to restrict attempts by men of property to endow their families in perpetuity, usually with land, in such manner that each successive living generation can neither part with the property nor prevent unborn generations from succeeding to it. Part One deals with attempts to accomplish this object by bestowing the whole title on each living generation but denying each such generation the power to dispose of the property or to prevent its descent to the next generation. In this part the principal restrictive rules are judicial, the common-law rules against restraints on alienation. Part Two deals with attempts to accomplish the same object by splitting the title into present and future estates; bestowing only an estate for life on the currently living generation and conveying future estates directly to unborn generations, so that the currently living generation cannot cut them off. In this part the principal restrictive rules are likewise judicial, the common law Rule Against Perpetuities and the common-law Rule Against Accumulations. Part Two also deals with a partial statutory substitute for the common-law Rule Against Accumulations which was in force in Michigan from 1847 to 1952. Part Three deals with a group of Michigan statutes, applicable to dispositions of land made between 1847 and 1949, which partially superseded the common-law Rule Against Per-

petuities and supplemented, but did not supersede, the common-law rules against restraints on alienation.

In earlier centuries the motivation for attempts to create perpetual family endowments of land arose primarily from the concept, made vivid by the philosophic realism of mediaeval schoolmen, of the agnatic family as a perpetual series of generations, an entity vastly more important than any single generation and deserving of the loyalty and devotion of each succeeding generation. When such ideas were generally accepted, the perpetual endowment of one's family with land, the chief source of prestige and social position, must have seemed as morally worthy and compellingly attractive as patriotic loyalty and the perpetual endowment of public, religious, and charitable organizations now seem to us. This concept has not been prominent in America, but other motives for the creation of indestructible family endowments exist. The desire to protect the immediate succeeding generation and its progeny against want and suffering caused by mismanagement or business reverses is one. Perpetuities created by means of future interests are commonly designed to avoid or minimize inheritance taxes by having unborn generations take by purchase instead of by descent.

Although the study centers upon the rules developed to restrict attempts to create perpetual family endowments of land, its scope is by no means limited to such attempts. The rules developed for this purpose are not limited in their operation to family settlements of land. Some of them apply to dispositions of personalty and to transactions which are primarily commercial in nature. Indeed, the application of rules designed to govern family settlements to very different sorts of transactions occasions much of the difficulty found in the cases, and

the fact that some of these rules invalidate seemingly inoffensive commercial transactions may make this study as valuable to practitioners who do not handle family settlement problems as to those who do.

The law of Michigan in the fields covered by this study was enormously complicated by the adoption in 1846 of some, but not all, of a New York statutory code which was designed to replace the entire common law of perpetuities, accumulations, trusts, and powers. The fact that some of this code was not adopted left questionable gaps in the law. The situation has been further complicated by the gradual piecemeal repeal, beginning in 1907, of sections of the partial code adopted in 1846. Because portions of that code are still in force, the law of Michigan is unique, different from both that of New York and that of states which follow the common law. Hence the general treatises which cover these fields are not fully satisfactory guides to the law of Michigan. If this book helps Michigan judges and lawyers to thread the complex maze of statutes and decisions in the fields covered, it will have served its purpose.

In an effort to prevent, so far as human fallibility permits, overlooking pertinent local precedents, I have, in addition to consulting the usual digests and secondary authorities, read the head notes of all published decisions of the Supreme Court and Court of Chancery of the Territory and State of Michigan to July 6, 1954, and read the opinions in all those cases which, from the head notes, appeared to have any possible bearing on the problems under study.

This study was begun (1940-41) when I was practicing with the Detroit firm of Lewis and Watkins. Messrs. Lewis and Watkins, especially Mr. James K. Watkins, were helpful in making available the time necessary for

the initial stages of the work. It was completed (1950-54) while I was a member of the University of Missouri Faculty of Law. Dean Glenn A. McCleary of that Faculty has given much friendly encouragement to the progress of the undertaking. Mr. Percy A. Hogan, Law Librarian of the University of Missouri, procured needed books. The initial and part of the final stages of the work were financed by the University of Michigan Law School. The original outline was prepared with the guidance of Professors Lewis M. Simes and Ralph W. Aigler of the University of Michigan Law Faculty and Professor (later Dean) Oliver S. Rundell of the University of Wisconsin Law School. The manuscript of Part One, which was accepted by the University of Michigan as a thesis in partial fulfilment of the requirements for the degree of Doctor of the Science of Law, was read by Professors Simes and Aigler and by their colleague, Professor Allan F. Smith. Portions of Part One were published originally in the *University of Detroit Law Journal* and the *Michigan Law Review* and are reprinted by permission. My wife typed the original outline and a large part of the manuscript and supplied much of the inspiration for the project.

To Professor Lewis M. Simes, Floyd Russell Mechem University Professor of Law and Director of Legal Research in the University of Michigan, I am deeply indebted for helpful guidance and advice throughout the progress of the study. He read every chapter as it was completed, often while still in longhand, and made suggestions of great value at all stages of the work.

WILLIAM F. FRATCHER

New York University
October 4, 1954

Table of Contents

	PAGE
FOREWORD BY LEWIS M. SIMES	vii
PREFACE	xi
PART ONE. RESTRAINTS ON ALIENATION	
Chapter 1. Introduction	1
A. Alienability in the Absence of Restraints . .	1
B. Scope of Part One	6
C. Michigan's Reception of English Law	9
Chapter 2. Entails	17
A. The English Background	17
B. The Michigan Statutes	27
Chapter 3. Present Legal Estates in Fee Simple .	37
A. The English Law	37
B. Restraints on Alienation by Deed	46
C. Restraints on Testation and Descent	65
D. Restraints on Partition and Division	75
E. Illusory Restraints	83
Chapter 4. Present Legal Estates For Life	91
Chapter 3. Present Legal Estates For Years	111
Chapter 6. Expectant Legal Interests in Land . .	138

	PAGE
Chapter 7. Legal Interests in Chattels Personal .	155
A. The Differences Between Land and Chattels	155
B. Donative and Testamentary Transactions .	163
C. Commercial Transactions	169
Chapter 8. Equitable Interests and Interests Sub- ject Thereto	198
A. The Origin of Equitable Estates	198
B. Trusts in the Absence of Statute	202
C. Michigan Statutory Changes in the Law of Trusts	210
D. Permissible Duration of Trusts of Land . .	216
E. Statutory Inalienability of Interests Under Trusts of Land	221
F. Spendthrift Trusts of Personalty	229
G. Charitable Trusts	239
H. Mortgages and Executory Land Contracts	240
 PART TWO. THE COMMON-LAW RULE AGAINST PERPE- TUITIES	
Chapter 9. Source, Nature and Local Reception .	259
A. The English Background	259
B. Michigan's Reception of the Rule	270
Chapter 10. The Period of the Rule	280
A. Commencement of the Period; Destruct- ibility	280
B. Computation of the Period	287

Chapter 11. The Requirement of Certainty of Vesting	304
A. Certainty	304
B. The Concept of Vesting in English Law...	311
C. Vesting Under Michigan Law	323
(1) Contingency as to Person or Event..	333
(2) What Language Creates Contingency	343
Chapter 12. Glass Gifts	358
Chapter 13. Powers of Appointment	370
A. Interests Limited in Default of Appointment	370
B. Powers of Appointment Themselves	372
C. Interests Appointed Under Powers	376
Chapter 14. Interests to Which the Rule Applies	387
A. Interests of a Transferor	388
B. Contracts, Options and Mortgages	397
Chapter 15. Trusts and Charities	409
A. Remoteness of Vesting	409
B. Duration; Restraints on Termination	421
(1) Charitable Trusts	422
(2) Honorary Trusts	423
(3) Trusts for Unincorporated Societies.	425
(4) Indestructible Trusts for Private Persons	426

	PAGE
Chapter 16. Accumulations	432
A. The Common-Law Rule Against Accumu- lations	432
B. The Michigan Statutes	435
Chapter 17. Consequences of Violation of the Rule	448
A. Excision of the Limitation Which Violates the Rule	448
B. Effect on Prior Limitations	454
C. Effect on Alternative and Concurrent Limi- tations	461
D. Effect on Subsequent Limitations	468

PART THREE. THE TWO LIVES STATUTES

Chapter 18. The Statutory Scheme	477
A. The Statutes	477
B. Suspension of the Absolute Power of Aliena- tion	485
C. Scope and Arrangement of Part Three	490
Chapter 19. The Restrictions on Life Estates ..	493
Chapter 20. What Suspends the Absolute Power Alienation?	504
A. Indestructible Future Interests	504

TABLE OF CONTENTS

xix

PAGE

B. Powers	516
(1) Powers Which Cause Suspension ..	516
(2) Interests Created by Execution of Powers	528
(3) Powers Which Prevent Suspension; Destructibility	532
C. Indestructible Trusts	549
(1) Trusts for Receipt of the Rents and Profits of Land	550
(2) Trusts for Payment of a Sum in Gross; Annuities	555
Chapter 21. The Statutory Period	570
A. Commencement of the Period	571
B. The Requirement of Certainty	572
C. Two Lives in Being	576
(1) What is a Life in Being?	576
(2) Ascertainment of the Measuring Lives	581
(3) Life of the Survivor of a Group	582
(4) Separability	602
D. The Restricted Minority Provision	604
E. Periods in Gross	608

TABLE OF STATUTORY AND CONSTITUTIONAL CITATIONS	613
---	-----

TABLE OF RESTATEMENT CITATIONS	626
--------------------------------------	-----

TABLE OF PERIODICAL CITATIONS	630
-------------------------------------	-----

TABLE OF CASES	633
----------------------	-----

INDEX	683
-------------	-----

PART ONE

RESTRAINTS ON ALIENATION

CHAPTER 1

Introduction

A. ALIENABILITY IN THE ABSENCE OF RESTRAINTS

DURING the century and a half which followed the Norman Conquest, the owner of land who attempted to transfer it might meet with opposition from three interested parties: his feudal overlord, his heir apparent, and his tenant. His feudal overlord might object to a transfer by way of substitution, that is, one under the terms of which the transferor did not retain a reversion, because the proposed transferee was not a suitable person to perform the feudal services due for the land. As these services were frequently of a personal or military nature, such an objection was not necessarily captious. His overlord might object with equal reason to a transfer by way of subinfeudation, that is, one under the terms of which the transferor did retain a reversion. Although in this case the transferor would remain personally responsible for the feudal services due to the overlord, the value of some of the feudal incidents of lordship might be seriously reduced. For example, if the owner died such, the overlord, by virtue of the feudal incident of wardship, would be entitled to possession of the land during the minority of the heir; whereas if the owner had transferred the land by way of subinfeudation, reserving only nominal services, such as a rose a year at midsummer, the overlord would be entitled only to those nominal services from the trans-

feree during the minority of the transferor's heir. The reason why an heir apparent might object to the alienation of his anticipated inheritance requires no elucidation. The tenant might have cogent reasons for opposing a transfer which would require him to render homage, fealty, and personal or military service to a stranger.

The extent to which the objections of the overlord, the heir, and the tenant constituted legal impediments to inter vivos alienation prior to the year 1200 is not now known and probably was far from clear at the time.¹ Early in the thirteenth century it was settled by judicial decision that neither the heir apparent nor the tenant could effectively prevent a transfer by the owner. If an owner in fee simple absolute transferred the land in his lifetime without the consent of his heir apparent, the heir could not get it back after his ancestor's death.² Although the acquiescence (attornment) of the tenant was necessary to the complete effectiveness of a transfer of land, that acquiescence could be compelled.³ The objection of the overlord was not so quickly overruled. The 1217 edition of Magna Carta expressly recognized the right of an overlord to object to alienation in some

¹ 1 Pollock and Maitland, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 310-330 (1895); 2 *id.* 93, 127-128, 250-253, 306-311; 3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 73-87 (1923). This doubtful state of the law is not surprising in view of the then relatively recent imposition of a system of feudal tenures upon the earlier Anglo-Saxon land law, which had included a variety of tenures and of local customs not fully understood by the Normans. Scrutton, *LAND IN FETTERS* 1-36 (1886).

² *FitzRoger v. Arundel*, Bract. N.B. pl. 1054 (1225).

³ *Pesehale v. Fitz Aucher*, Bract. N.B. pl. 533 (1231); *Cambridge v. Risle*, R.S.Y.B. 34-35 Edw. I, 314 (1306). The requirement of attornment was abolished by Stat. 4 Ann. c. 16, §9 (1705). It never existed in Michigan. *Perrin v. Lepper*, 34 Mich. 292 (1876).

cases.⁴ Nevertheless, there is reason to believe that by 1284 the courts recognized the power of an owner of land to transfer it without the consent of his overlord.⁵ However that may be, the question was settled by the enactment in 1290 of the Statute of Westminster III, commonly known as *Quia Emptores Terrarum*.⁶ This statute forbade further transfers by way of subinfeudation and provided,

"That from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, . . . This statute extendeth but only to lands holden in fee simple."⁷

Although it may have been possible to transmit land

⁴ "No freeman from henceforth shall give or sell any more of his land, but so that of the residue of his lands the lord of the fee may have the service due to him, which belongeth to the fee." C. 39, BARRINGTON, *MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND*, 2d ed., 279 (1900). This provision was repeated in 9 Hen. III, stat. 1, c. 32 (1225), 2 Coke, *INSTITUTES* 65. The "*Grand Chartre des Franchises*" of Henry III was confirmed by 25 Edw. I, stat. 1, c. 1 (1297), 28 Edw. I, stat. 3, c. 1 (1300), and 42 Edw. III, c. 1 (1368) but without specific mention of chapter 32. It would seem that these confirmations of *Magna Carta* did not revive chapters which had been repealed or modified by later statutes. Jenk. 2, 145 Eng. Rep. 2 (1771).

⁵ Plucknett, *LEGISLATION OF EDWARD I*, 104 (1949). The Statute of Wales, 12 Edw. I, c. 10 (1284), 1 Stat. of the Realm 55, 66 (1810) prohibited specific enforcement of covenants against alienation. This statute was a codification of the existing English common law made for the purpose of extending it to Wales and, although not applicable to England, is evidence of the current state of the common law.

⁶ 18 Edw. I, stat. 1 (1290).

⁷ *Id.*, caps. 1, 3; 2 Coke, *INSTITUTES* 500, 504. Sir Edward Coke states that the word "sell" (*vendere*) includes "give." *Id.*, 501. The statute was not construed to permit alienation by tenants in chief of the Crown without royal license [3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 81, 83-84 (1923)] but this exception was narrowed by statutes providing that lands once held under a subordinate overlord should not be treated as being held in chief of the Crown by reason of the king's acquiring the overlord's estate by escheat, attainder, dissolution, or surrender. 9 Hen. III, stat. 1, c. 31 (1225); 1 Edw. III, stat. 2, c. 13 (1327); 1 Edw. VI, c. 4 (1547). Moreover, a transfer by a tenant in chief without royal license was not void but merely entitled the king to a reasonable fine. 17 Edw. II, stat. 1, c. 7 (1324); 1 Edw. III, stat. 2, c. 12 (1327). Such fines for alienation of land held of the Crown in chief were abolished by stat. 12 Car. II, c. 24, §1 (1660).

by will in the Anglo-Saxon and early Norman periods, it became settled in the twelfth century that a devise of a legal freehold estate in land was ineffective as against the heir of the testator.⁸ Early in the thirteenth century the device of conveying legal title to others to hold to the use of the transferor or those whom he might name was developed.⁹ The rights of the beneficiary of a conveyance to uses, who was known as a *cestui que use*, were not initially enforceable in any tribunal, and the common-law courts never did enforce them, but from the end of the fourteenth century they were enforceable in equity.¹⁰ Such rights were conceived of as being more in the nature of a chose in action than a property interest, and choses in action were not assignable.¹¹ Nevertheless, the interest of the *cestui que use* was always alienable inter vivos, and a statute of 1483 empowered him to convey the legal title without the consent of the legal owner.¹² The interest of the *cestui que use* was transmissible by will, and one of the chief purposes of the use device was to avoid the rule that legal freehold estates in land could not be devised.¹³ This possibility

⁸ 2 Pollock and Maitland, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 312-328 (1895). There were exceptions to this rule as to land in towns. *Id.*, 330.

⁹ *Quency v. Prior of Barnwell*, Bract. N.B. pl. 999 (1224).

¹⁰ *Godwyn v. Profyt*, Sel. Cases in Chancery (S.S.) 48 (1396-1399); Ames, "Origin of Uses and Trusts," 21 HARV. L. REV. 261 at 262, 274 (1908); Brown, "Ecclesiastical Origin of the Use," 10 NOTRE DAME LAWYER 353 at 361-366 (1935).

¹¹ Ames, "The Inalienability of Choses in Action," LECTURES ON LEGAL HISTORY 210-218 (1913).

¹² Stat. 1 Ric. III, c. 1 (1483); Bacon, *READING UPON THE STATUTE OF USES* 16 (1642); Cruise, *ESSAY ON USES* §36 (1795); Gilbert, *LAW OF USES AND TRUSTS*, 2d ed., 26 (1741); Holmes, *COMMON LAW* 408 (1881); Sanders, *ESSAY ON USES AND TRUSTS*, 4th ed., 65 (1823).

¹³ *Rothanhale v. Wychingham*, 2 Cal. Proc. Ch. iii (1413-1422); *Williamson v. Cook*, Sel. Cas. in Chan. (S.S.) pl. 118 (1417-1424), note 539, *infra*; Stat. 4 Hen. VII, c. 4 (1487); 7 Hen. VII, c. 3 (1490); 3 Hen. VIII, c. 4 (1511); Sullivan, *HISTORICAL TREATISE ON THE FEUDAL LAW* 166-167 (1772); Jenks, *SHORT HISTORY OF ENGLISH LAW*, new ed., 104 (1934); Maitland, *EQUITY*, 2d ed., 25-26 (1936).

was cut off in 1535 by the Statute of Uses, which converted the interest of the beneficiary into a legal estate.¹⁴ Five years later the power to transmit legal freehold estates by will was conferred by statute.¹⁵

The Statute of Uses had no application to property interests other than freehold estates in land, and within a century after its enactment the High Court of Chancery created two important exceptions to its applicability to freehold interests in land. The uses excepted from the operation of the statute were the use created by a conveyance which imposed active duties upon the conveyee¹⁶ and the use on a use.¹⁷ In these cases and in the case of a conveyance to uses of something other than a freehold interest in land, the transaction was enforced in equity as a trust. The early decisions treated the interest of the beneficiary of a trust as a chose in action which could be transmitted by will but was not transferable inter

¹⁴ Stat. 27 Hen. VIII, c. 10 (1535). This statute is entitled, "An Act concerning Uses and Wills," and its preamble recites as its primary purpose the abolition of wills of land. It may be that this effect of the Statute of Uses could be avoided by making a feoffment to such uses as the feoffor might by will appoint. See Sir Edward Clere's Case, 6 Co. Rep. 17b, 77 Eng. Rep. 279 (1599).

¹⁵ Statute of Wills, 32 Hen. VIII, c. 1 (1540). The explanatory statute of 34 & 35 Hen. VIII, c. 5 (1542) limited the operation of the Statute of Wills to estates in fee simple, thus excluding estates in fee tail and estates *pur autre vie*. The latter were made devisable by Stat. 29 Car. II, c. 3, §12 (1676). The Statute of Wills restricted the devisability of land held by knight-service. This form of tenure was abolished and land formerly so held made freely devisable by Stat. 12 Car. II, c. 24, §1 (1660). See 1 Coke, INSTITUTES 111b (Hargrave's note No. 138 to 13th ed., 1787). The restriction on devisability of land held by knight-service could be avoided by making a feoffment to such uses as the feoffor might by will appoint. Sir Edward Clere's Case, note 14 *supra*.

¹⁶ Anonymous, Brook's New Cases 94, 73 Eng. Rep. 888 (1544); Nevil v. Saunders, 1 Vern. 415, 23 Eng. Rep. 555 (1686).

¹⁷ Tyrrel's Case, 2 Dyer 155a, 73 Eng. Rep. 336 (1557) (common-law decision that use on a use is not executed); Sambach v. Dalston, Tot-hill 188, 21 Eng. Rep. 164 (1634) (Chancery decision that use on a use is enforceable in equity); Ames, "Origin of Uses and Trusts," 21 HARV. L. REV. 261 at 270-274 (1908).

vivos.¹⁸ Before long, however, the property analogy prevailed and a *cestui que trust* could transfer his interest inter vivos as freely as he could an equivalent legal estate.¹⁹

The transferability of estates for life seems to have been conceded without serious opposition in the mediæval period.²⁰ Such a transfer did not affect the overlord's feudal incident of wardship or injure the transferor's heir. Estates for years were treated as chattel interests and regarded as freely alienable, both by assignment inter vivos²¹ and by will.²² The law of England has always recognized the alienability of chattels personal, both inter vivos²³ and by will.²⁴

B. SCOPE OF PART ONE

It thus appears that by the time English law was carried to this country in the seventeenth and eighteenth centuries it recognized that, in the absence of special restrictions on alienability imposed by the creator of the interest or by its owner, property interests, real and personal, were transferable by their owner, either inter vivos or by will. As to estates in fee simple, the incident of alienability was expressly conferred by the statute *Quia*

¹⁸ Anonymous, 3 Dyer 369a, 73 Eng. Rep. 827, Jenk. 245, 145 Eng. Rep. 172 (1580); Earl of Worcester v. Finch, 4 Coke, INSTITUTES 85, 2 Anderson 162, 123 Eng. Rep. 600 (1600); Holmes, COMMON LAW 409 (1881).

¹⁹ Warmstrey v. Lady Tanfield, 1 Ch. R. 29, 21 Eng. Rep. 498 (1628).

²⁰ Littleton, TENURES §301 (1481); 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 123 (1923).

²¹ Fitz Henry v. Utdeners, Bract. N.B. 804 (1233); Littleton, TENURES §319 (1481).

²² 2 Pollock & Maitland, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 115-117 (1895); 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 215 (1923).

²³ Cochrane v. Moore, 25 Q.B.D. 57 (Ct. App. 1890).

²⁴ Anonymous, S.S.Y.B. 1 & 2 Edw. II, 39, 42 (1308); 2 Pollock & Maitland, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 353 (1895); 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 552-553 (1923).

Emptores Terrarum.²⁵ From an early period, English law had permitted access by judgment creditors to property which the debtor had power to transfer voluntarily.²⁶ There then were and still are a number of restrictions imposed by law upon the free alienability of property. Nevertheless, by the law of England, property interests are, in general, alienable. In Part One the question for inquiry is, to what extent will the law recognize and enforce special restrictions on alienability, imposed by the creator of the interest or its owner, on property interests which, in the absence of such special restrictions, would be alienable? Such a restriction may assume the form of a prohibition on alienation, the effect of which would be, if enforced, to leave the owner still owner despite an attempt on his part to transfer his interest. It may assume the form of a provision that the interest shall revert to its creator or pass to a third party if the owner attempts to transfer it. Or it may provide for some other penalty to be suffered by the owner or his transferee in the event of a transfer.

Part One does not cover the validity of indirect restraints on alienation, that is, provisions which do not directly nullify or penalize a transfer of property but which have the indirect effect of making alienation impossible, difficult, or improbable. The creation of property interests in unborn or unascertained persons has the effect of making them inalienable, because there is no owner to alienate.²⁷ The creation of a type of interest as to which the law imposes restrictions on alienation

²⁵ 18 Edw. I, stat. 1, c. 1 (1290); note 7 *supra*.

²⁶ 13 Edw. I, stat. 1, c. 18 (1285); *Amby v. Gower*, 1 Ch. Rep. 168, 21 Eng. Rep. 540 (1655); 1 Coke, INSTITUTES 191a (Butler's note No. 77, VI 9, to 13th ed. 1787).

²⁷ As to the possibility of creating such interests, see Fratcher, "Trustor as Sole Trustee and Only Ascertainable Beneficiary," 47 MICH. L. REV. 907-934 (1949).

has the effect of restraining its alienation although the creator of the interest may not wish this result. For example, a conveyance of land to a husband and wife creates a tenancy by the entirety which neither tenant, acting alone, can alienate, wholly or in part.²⁸ Even though a property interest is legally transferable, its sale may be commercially impracticable if it does not entitle the owner to exclusive enjoyment of the land or goods concerned, if enjoyment is burdened with onerous servitudes, or if enjoyment is uncertain as to coming into existence or duration. Property subject to cotenancy, easements, profits, or use restrictions may be very hard to sell because of such burdens. A present interest which is subject to being defeated by the happening of an event which is not certain to occur or uncertain as to time of occurrence is likely to be unsalable. A future interest which may never become possessory unless an uncertain event occurs is almost certain to be unmarketable. There is little commercial demand for future interests, even those which are certain to become possessory, particularly if the date when enjoyment is to commence is uncertain. The law recognizes the social undesirability of too great extension of these indirect restraints upon alienation and upon free commerce in property and sets limits to them in various ways, some of which are treated in Parts Two and Three of this book. The common-law Rule Against Perpetuities, which is the subject of Part Two, restricts the creation of contingent future interests. The former statute prohibiting suspension of the absolute power of alienation for unduly long periods, which is treated in Part Three, restricted the creation of interests in unborn and unascertained persons and of interests

²⁸ *Naylor v. Minock*, 96 Mich. 182, 55 N.W. 664 (1893).

which the law makes inalienable.²⁹ Part One does not extend to such indirect restraints upon alienation except where an interest is made conditional upon or subject to defeasance by alienation, or the creator or owner of an interest which is by its nature affected by an indirect restraint attempts to impose an additional restriction designed to nullify or penalize such alienation as would otherwise be legally possible.

C. MICHIGAN'S RECEPTION OF ENGLISH LAW

The direction and scope of the present inquiry have been defined, but discussion of the Michigan decisions relative to direct restraints on alienation must be deferred to a preliminary inquiry into the extent to which the law of England has been adopted as the rule of decision in Michigan. Until its cession to Great Britain by the Treaty of Paris of 1763, the area which now composes the State of Michigan was subject to the laws of France and of the French colonial government. By the law of England, the settlement of uninhabited territory by English colonists extends to that territory the common law and statutes of England then in force, but English law does not extend to conquered territory unless and until so extended by the king.³⁰ As Michigan

²⁹ The common-law rules restricting restraints on alienation, which are the subject of Part One, are sometimes confused with the statutes restricting suspension of the absolute power of alienation, which are the principal subject of Part Three. These statutes supplemented but did not supersede the common-law rules against restraints on alienation. For the distinction between a restraint on alienation and suspension of the absolute power of alienation, see Chapter 18, Section B, *infra*.

³⁰ Calvin's Case, 7 Co. Rep. 1a, 17b, 77 Eng. Rep. 377, 398, and Fraser's note k (1608); Blankard v. Galdy, 4 Mod. 215, 87 Eng. Rep. 356, 2 Salk. 411, 91 Eng. Rep. 356 (1693); Sioussat, "The Theory of the Extension of English Statutes to the Plantations," 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 416-430 (1907). The present writer has

became British by conquest rather than by settlement, the problem of whether English law is in force here is, therefore, different from that in the seaboard states.

The British government was very slow in extending its administration to the area, no definite provision being made until it was incorporated into the Province of Quebec by the Quebec Act of 1774, which provided that the law of Canada, that is, the French law, should be the rule of decision in matters of property and civil rights.³¹ In 1791 the old Province of Quebec was divided into Upper Canada and Lower Canada, the former embracing the territory which now composes Michigan and Ontario.³² In the following year the legislature of Upper Canada repealed the Quebec Act insofar as it made the law of Canada the rule of decision and provided:

“That from and after the passing of this Act, in all matters of controversy relative to property and civil rights, resort shall be had to the Laws of England, as the rule for the decision of the same.”³³

On July 14, 1795, the Governor and Judges of the Territory of the United States Northwest of the River Ohio adopted a law reading as follows:

“The common law of England, all statutes or Acts of the British parliament in aid of the common law, prior to the fourth year of the reign of King James the first

discussed the vexed question of the application to colonial possessions of British statutes enacted after the settlement or conquest of the colony in an unpublished magisterial thesis entitled, *A COMMENTARY FOR CANADA ON THE STATUTE OF WESTMINSTER*, 1931, pp. 118-123 (1938), copies of which are deposited in the library of Wayne University.

³¹ Stat. 14 Geo. III, c. 83, §§1, 18. Great Britain was in actual control of Michigan from November 29, 1760 to July 11, 1796, despite the provisions of the treaties of 1783 and 1794. 1 Burton, *CITY OF DETROIT* 114, 154 (1922); Riddell, *MICHIGAN UNDER BRITISH RULE: LAW AND LAW COURTS 1760-1796*, 21-26 (1926); Russell, *THE BRITISH REGIME IN MICHIGAN AND THE OLD NORTHWEST 1760-1796*, 16, 270n (1939).

³² Canada Act, 31 Geo. III, c. 31 (1791).

³³ Stat. 32 Geo. III (Upper Canada), c. 1, §3 (1792).

(and which are of a general nature, not local to that kingdom) and also the several laws in force in this Territory, shall be the rule of decision, and shall be considered as of full force, until repealed by legislative authority, or disapproved of by Congress.”³⁴

It has been suggested that this law of the Northwest Territory is the basis upon which the law of England, as altered by local statutes, is applied in Michigan,³⁵ but this is probably inaccurate, for Michigan was not annexed to the Northwest Territory until July 15, 1796, and a mere cession of territory from one sovereign to another does not of itself alter the law of the land.³⁶ The statute of Upper Canada would seem to be in force in Michigan, however, except insofar as repealed or modified by local statutes.³⁷

On September 16, 1810, the Governor and Judges of Michigan Territory adopted an act providing that no act of the parliament of England, no act of the parliament of Great Britain, no law of France or the French provinces of Canada or Louisiana, no law of Canada generally or of the province of Upper Canada under the British Crown, and no law of the Northwest Territory or Indiana Territory should have any force in

³⁴ Laws of the Territory of the United States North-West of the Ohio, 175, 176 (1796). As to the validity of this law see 1 Trans. Sup. Ct. Terr. Mich., 1805-1814, xiv, xv. The similar law of Indiana Territory (Act Sept. 17, 1807, Laws of Indiana Territory, p. 323) was never effective in Michigan because Michigan was part of Indiana Territory only from July 4, 1800, to June 30, 1805.

³⁵ *May v. Rumney*, 1 Mich. 1, 4 (1847). See: *Abbott v. Godfroy's Heirs*, 1 Mich. 178 (1849).

³⁶ Laws of the Territory of Michigan, x (1871).

³⁷ In *Denison v. Tucker*, 1 Trans. Sup. Ct. Terr. Mich. 1805-1814, 385 (1807), Chief Judge Woodward of the Territorial Supreme Court held that a statute of Upper Canada authorizing slavery ceased to operate in July, 1796, but on the ground it was superseded by the anti-slavery provisions of the Ordinance of 1787.

Michigan.³⁸ The legislative authority of the Governor and Judges was limited to the adoption of "laws of the original states."³⁹ In token of conformity to this limitation, the act of September 16, 1810, recites that the part of it relative to British statutes and laws of the Northwest and Indiana territories is taken from the law of Virginia, and that relative to French and Canadian law from the law of Vermont. The writer has been unable to find any Virginia statute repealing the laws of the Northwest Territory or Indiana Territory, or any Vermont statute repealing the laws of Upper Canada. In consequence, the validity of the act of September 16, 1810, would seem to be dubious. Nevertheless, the Supreme Court of Michigan has held that it was effective to repeal English statutes of Henry VIII, Elizabeth I, and Charles II.⁴⁰

³⁸ 1 Laws Terr. Mich. 210, 900 (1871). This act was expressly excepted from the act of the Legislative Council of April 13, 1827 which repealed most of the early territorial legislation. 3 *id.*, 602, 603. Since Michigan has become a state there have been only two attempts to revise and reenact completely all the statutory law, Rev. Stat. 1838 and 1846. Neither revision appears to repeal the 1810 act.

³⁹ Ordinance of 1787, §5, 1 Mich. Comp. Laws (1948) 53; act Jan. 11, 1805, 2 Stat. 309, 1 Mich. Comp. Laws (1948) 58.

⁴⁰ *Grant v. Earl of Selkirk*, 1 Trans. Sup. Ct. Terr. Mich. 1814-1824, 431 (1818) (Lord's Day Act, 29 Car. II, c. 7, 1676. The court held, however, that the statute was merely declaratory of the common law, which is in force in Michigan); *Bruckner's Lessee v. Lawrence*, 1 Doug. 19 (Mich. 1843) (Stat. 32 Hen. VIII, c. 9, 1540); *Trask v. Green*, 9 Mich. 358 (1861) (Statute of Uses, 27 Hen. VIII, c. 10, 1535); *Ready v. Kearsley*, 14 Mich. 215 (1866) (*id.*); *Methodist Episcopal Church of Newark v. Clark*, 41 Mich. 730, 3 N.W. 207 (1879) (Statute of Charitable Uses, 43 Eliz., c. 4, 1601.) In this case the court did not recognize that the Statute of Charitable Uses was declaratory of the common law despite the convincing evidence to that effect presented by Horace Binney in *Vidal v. Girard's Executors*, 2 How. (43 U.S.) 127 (1844). In his dissenting opinion in *Laraviere v. Campau*, 1 Trans. Sup. Ct. Terr. Mich. 1825-1836, 305 at 312, Judge Sibley suggested that all English statutes passed before the colonization of America were part of the common law in force in Michigan. There are dicta by Justice Christiancy in *Trask v. Green*, 9 Mich. 358 at 365 (1861) and Chief Justice Campbell in *In the Matter of Lamphere*, 61 Mich. 105 at 108, 27 N.W. 882 (1886), suggesting that the English statutes were never

In a case decided in 1845, counsel contended that the common law was repealed by the Schedule to the Constitution of 1835 or by the Revised Statutes of 1838. This contention was rejected by the Supreme Court, which held that the common law is in force in Michigan.⁴¹ Assuming the soundness of this decision and of those holding that the act of September 16, 1810, repealed the Tudor and Stuart statutes, are the statutes of the Plantagenet kings in force in Michigan? In his astonishing opinion in *Grant v. Earl of Selkirk*,⁴² Judge Woodward stated that the common law "became complete, and insusceptible of any additions" upon the coronation of Richard the Lion-Hearted, September 3, 1189.⁴³ Such a view would restore trial by ordeal and wager of battle; it would deny that even *Magna Carta* and the English case law of the thirteenth through sixteenth centuries are part of the common law and would

effective in Michigan, but they are clearly erroneous. In his dissenting opinion in *Dalby v. State Highway Commissioner*, 283 Mich. 609, 278 N.W. 694 (1938), at pp. 625-627, Justice Potter expressed the view that the Act of 1810 was void and that the English statutes have been since 1796 and still are a part of the law of Michigan.

⁴¹ *Stout v. Keyes*, 2 Doug. 184 (Mich. 1845). *Accord: Lorman v. Benson*, 8 Mich. 18 (1860); *Reynolds v. McMullen*, 55 Mich. 568, 22 N.W. 41 (1885). A better argument would have been that, as it was the Upper Canada Act of 1792 (note 33 *supra*) which extended the common law to this area, the repeal of that act in 1810 repealed the common law. The schedules to the Constitutions of 1850 and 1908 provide that the common law shall remain in force until altered or repealed. 1 Mich. Comp. Laws (1948) pp. 105 and 151. In *Stanton v. Loranger*, 1 Trans. Sup. Ct. Terr. Mich. 1825-1836, 282 (1825) it was held that a common-law rule does not apply here unless the facts and principles upon which it was founded exist here.

⁴² 1 Trans. Sup. Ct. Terr. Mich. 1814-1824, 431 (1818).

⁴³ *Id.* at 436. In fairness to Judge Woodward, it should be noted that he did use English cases decided after 1189 as precedents, probably upon the theory that, although the common law remains complete, static, and unchangeable, judges find or declare it from time to time as occasion requires. No doubt the modern concept, necessitated by the research of legal historians, of the common law as a constantly growing and developing system, moulded by the judges to fit new conditions, would have been anathema to Judge Woodward.

confine that term to a primitive system which is virtually unknown and certainly unsuited to a modern community. Sir Matthew Hale thought that the statutes enacted prior to 1327 or 1336 should be treated as part of the common law,⁴⁴ and even a most conservative view would include later non-statutory judicial developments, at least through the period of the Year Books. Although there is reason to believe that parts of the two Plantagenet statutes which are most significant in the law of restraints on alienation, *De Donis Conditionalibus*⁴⁵ and *Quia Emptores Terrarum*,⁴⁶ declared pre-existing common law,⁴⁷ the view that thirteenth and fourteenth century statutes were mere customals, solely declaratory of the common law and effecting no change in it whatever, has been effectively refuted.⁴⁸

The English polity of the thirteenth and fourteenth centuries knew no clear differentiation among executive, legislative, and judicial functions. The king in his council, of which the royal judges were important members, was chief executive, supreme legislator, and chief judge. His formal enactments, orders in council, written and oral instructions to judges about to go on circuit, and decisions of litigated cases were alike sources of law. The judges had administrative as well as judicial functions and their pronouncements were sometimes legislative, sometimes administrative, sometimes judicial, and some-

⁴⁴ Hale, HISTORY OF THE COMMON LAW OF ENGLAND, 3d ed., 7-9 (1739). Sir Edward Coke thought that the statutes enacted prior to 1351 were part of the common law. 8 REPORTS, Preface, xxiii. (1611). Cf. dissenting opinion of Sibley, J. in *Laraviere v. Campau*, note 40 *supra*.

⁴⁵ 13 Edw. I, stat. 1, c. 1 (1285).

⁴⁶ 18 Edw. I, stat. 1 (1290).

⁴⁷ Plucknett, LEGISLATION OF EDWARD I, 104 (1949); Plucknett, STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 10, 130-131 (1922).

⁴⁸ *Id.*, 26-31; *Venour v. Blund*, S.S.Y.B. 3 & 4 Edw. II, 159, 162 (1310).

times all three. In later centuries, when Parliament, the Council, and the courts had become sharply distinct, compilers chose to print some of the early royal charters, proclamations, and orders with the acts of Parliament. Many, perhaps most, of the rules which were not so printed had origins which were equally as legislative as those which were printed.⁴⁹ The law of the thirteenth and fourteenth centuries cannot be divided into statute law and common law as can that of later eras. Any attempt to adopt the common law of those centuries and reject the statutes produces disconnected fragments of what was a unified legal system, selected according to arbitrary modern standards which would be unintelligible to contemporary lawyers. We must adopt Plantagenet law as a whole or reject it entirely.

To Americans generally, the English common law is the general system of jurisprudence, including statutes and their judicial interpretation, expounded in the *Institutes* of Sir Edward Coke. The usual view, exemplified by the law of the Northwest Territory of 1795,⁵⁰ that the law of England, statutory and otherwise, as it was at the time of the settlement of Virginia in 1607, is in force in this country⁵¹ is consistent with this concept. It provides a complete and integrated system of law upon which American courts and legislatures may engraft such changes and additions as our social conditions and development require. The unfortunate territorial law of September 16, 1810, and the decisions

⁴⁹ Plucknett, *STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY* 1-2, 7-11, 20-25 (1922); 1 Pollock & Maitland, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 159-160 (1895).

⁵⁰ Note 34 *supra*.

⁵¹ 1 Kent, *COMMENTARIES ON AMERICAN LAW*, 11th ed., 515-516, notes (a), (b) (1867); 1 Blackstone, *COMMENTARIES*, (Cooley's 2d ed.) 67, Cooley's note (3) (1872).

that the statutes of the Tudors and Stuarts were repealed by it ⁵² prevent Michigan from being fully in accord with the general American view. They do not prevent a decision that the Plantagenet statutes are part of that common law which is declared to be in force by the Schedule to the Constitution of Michigan. ⁵³

⁵² Note 40 *supra*.

⁵³ Note 41 *supra*. In his great opinion in *Mandlebaum v. McDonell*, 29 Mich. 78 at 95 (1874), Justice Christiancy suggested that, whether or not the statute *Quia Emptores Terrarum* is in force as such here, its principles have always been basic in the law of the western states.

CHAPTER 2

Entails

A. THE ENGLISH BACKGROUND

INCIDENT to his daughter's marriage, the mediaeval man of property commonly gave land to his new son-in-law to facilitate support of the daughter and the children of the marriage. The donor in such cases, understandably, desired to restrict the gift so that the land would be certain to go to the children of the marriage rather than to the son-in-law's children by some other wife, that it would not be lost by the improvidence of the son-in-law, and that it would return to the donor if there were no children of the marriage or if the issue of the marriage failed. The device used for this purpose from very early times, probably before the Norman Conquest, was the *maritagium*, a gift under the terms of which the land could descend only to issue of the marriage; the immediate donee, the children of the marriage, and the grandchildren of the marriage were forbidden to alienate in fee; and the land returned to the donor if there was no issue of the marriage or if the issue of the marriage failed before a great-grandchild inherited. If a great-grandchild of the marriage did succeed to the title, he and his heirs owned the land in fee simple absolute.⁵⁴

⁵⁴ Plucknett, *LEGISLATION OF EDWARD I, 125-127* (1949). Strictly speaking, the entailment lasted until there had been three descents. If a son died before his father, the descent to the grandson would be only one. In such cases the restraint on alienation might extend beyond grandchildren. There were other forms of *maritagium*. The gift might be to the daughter or to the daughter and son-in-law jointly. When the terms exempted the estate conveyed from feudal services during

There were other situations, notably gifts to younger sons, in which restrictions upon inheritance and alienation and provisions for reversion to the donor seemed desirable, particularly after the courts decided, early in the thirteenth century, that an owner in fee simple could transfer his estate without the consent of his heir apparent.⁵⁵ These restrictions were commonly imposed by making the gift to the donee and the heirs of his body, to him and the heirs male of his body, or to him and the heirs of his body by a particular wife. Initially such gifts seem to have been construed and enforced similarly to the *maritagium*, but about the middle of the thirteenth century the courts, probably due to the influence of Roman law, held that all such gifts, including the *maritagium*, were in fee simple conditional. That is, they construed a gift to "B and the heirs of his body" to mean "to B in fee simple on condition that he have heirs of his body." Under this tortured construction, the donee of a conditional fee could transfer a fee simple absolute, cutting off both the reversion of the donor and the expectancy of his heirs, as soon as issue of the specified class was born.⁵⁶ This judicial legislation enabled a donee to thwart the reasonable desire of a parent who made a gift incident to the marriage of a son or daughter that the land should revert to him if there were no children of the marriage and that it should pass to the children of the marriage if any there were. In modern law this desire can be effectuated by

the period of inalienability, the transaction was known as a gift in frank marriage.

⁵⁵ *Id.* at 127-128; 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 111-113 (1923); PROPERTY RESTATEMENT, Introductory Note to Div. IV, Pt. I (1944).

⁵⁶ *Brian v. London*, R.S.Y.B. 32-3 Edw. I, 279 (1304). An alienation by the donee before birth of issue barred the issue but not the donor's reversion. 1 Coke, INSTITUTES 19a.

a conveyance to the donee for life, with remainder in fee to his children, which makes the children take by purchase instead of by descent. Although future interests by way of remainder were not unknown in the thirteenth century,⁵⁷ the law governing them was in a very imperfect state of development. It is probable that conveyancers of that century anticipated the rules which became established in the next century that remainders limited to unborn persons were contingent and that contingent remainders were invalid.⁵⁸ Accordingly, the enactment of a statute seemed to be the only effective way of making it possible for a donor to make sure that he would get the land back if there were no children of the marriage to which the gift was incident, and that they would get it if there were.

Chapter I of the Statute of Westminster II,⁵⁹ known as *De Donis Conditionalibus*, recited the recent judicial construction which defeated the intent of the donor of a *maritagium* or other fee simple conditional, and provided:

⁵⁷ 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 104 (1923).

⁵⁸ *Id.* at 134-136. Even after the validity of contingent remainders was established in the fifteenth century, they would not have served the purpose at hand because, under the Rule in Shelley's Case, 1 Co. Rep. 93b, 104a, 76 Eng. Rep. 206, 234 (1581), and the doctrine of worthier title [*Fenwick v. Mitforth*, Moore K. B. 284, 72 Eng. Rep. 583 (1589); *Read v. Erington*, Cro. Eliz. 321, 78 Eng. Rep. 571 (1594); *Bingham's Case*, 2 Co. Rep. 82b, 91a, 76 Eng. Rep. 599, 611 (1600); *Wills v. Palmer*, 5 Burr. 2615, 98 Eng. Rep. 376 (1770); *Doe ex dem. Earl and Countess of Cholmondeley v. Maxey*, 12 East 589, 104 Eng. Rep. 230 (1810)], attempts to limit remainders to the heirs of the life tenant or the heirs of the donor gave interests by descent, not by purchase, and even a valid contingent remainder was destroyed by the life tenant's conveyance in fee. *Biggot v. Smyth*, Cro. Car. 102, 79 Eng. Rep. 691 (1628). It is scarcely necessary to point out that the trust to preserve contingent remainders was not invented until the seventeenth century. See Fratcher, "Trustor as Sole Trustee and Only Ascertainable Beneficiary," 47 MICH. L. REV. 907-918 (1949); Part Two, notes 14-21, *infra*.

⁵⁹ 13 Edw. I, stat. 1, c. 1 (1285).

"Wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained, that the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed; so that they to whom the land was given under such condition, shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver, or his heirs, if issue fail (whereas there is no issue at all) or if any issue be, and fail by death, or heir of the body of such issue failing."

The statute provided remedies to enforce the donor's reversion when issue of the donee failed and to protect the issue's right to the land when the donee had alienated and died. The courts soon devised a similar remedy to enforce a remainder limited after the gift to the donee and the heirs of his body.⁶⁰ The effect of the statute, as applied by the courts, was to give the donee a new type of estate of inheritance, the fee tail, which, unlike the pre-statutory conditional fee, was not a fee simple but a lesser estate carved out of the fee simple. After the creation of an estate tail, what was left of the fee simple remained in the donor by way of reversion or passed to another by way of remainder.⁶¹ In consequence, the statute *Quia Emptores Terrarum*,⁶² enacted five years after *De Donis Conditionalibus*, being limited to estates in fee simple, had no application to estates tail as such, although it did apply to the reversion or remainder in fee simple following an estate tail. In inter vivos conveyances the words "heirs" and "body" were both required for the creation of an estate tail; such words as

⁶⁰ Fitzwilliam v. Anonymous, R.S.Y.B. 33-35 Edw. I, 20 (1305); Anonymous, S.S.Y.B. 1 & 2 Edw. II, 166 (1308-09).

⁶¹ 1 Coke, INSTITUTES 18b-19b, 327a.

⁶² Or Westminster III, 18 Edw. I, stat. 1, notes 6 and 7 *supra*.

seed, issue, and the like being insufficient as substitutes for "heirs," although some substitutes for "body" were allowed. In the construction of devises, however, much latitude was allowed, the only requirement being a sufficient expression of an intention to entail.⁶³

De Donis Conditionalibus clearly restrained alienation by the immediate donee in tail, but it was not clear as to whether it restrained alienation by his issue. The word "issue" in the statute may have referred only to the children or immediate heirs of the donee in tail or it may have meant lineal descendants forever. There is respectable authority for the view that the statute was not designed to revive the restrictions of the ancient *maritagium* or to permit perpetual entails, but was only intended to make it possible to give a life estate to the immediate donee with an unbarrable remainder in fee simple to his heir.⁶⁴ However that may be, it was decided in 1312 that the son of the donee in tail could not alienate, with a suggestion that the restraint extended, as in the ancient *maritagium*, to the grandson of the donee,⁶⁵ and in 1330 it was settled that the restraint on alienation was perpetual, binding the heirs of the donee

⁶³ 1 Coke, INSTITUTES 9b, 20a-20b, 27a-27b. For the varieties and incidents of estates tail see *id.*, 18b-28b, and 2 Blackstone, COMMENTARIES *113.*119.

⁶⁴ Bolland, Introduction to S.S.Y.B. 5 Edw. II, xxv-xxix (1915); 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 114 (1923); Plucknett, STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY, 51-52 (1922); Plucknett, LEGISLATION OF EDWARD I, 131-135 (1949). But see Updegraff, "The Interpretation of 'Issue' in the Statute De Donis," 39 HARV. L. REV. 200-220 (1925).

⁶⁵ Belyng v. Anonymous, S.S.Y.B. 5 Edw. II, 176, 177 (XI Y.B. Ser.), 5 Edw. II, 225, 226 (XII Y.B. Ser.) (1312). This was the utmost limit to which such a restraint could extend under Justinian's Novel 159 [17 Scott, THE CIVIL LAW 187 (1932)], Buckland, TEXTBOOK ON ROMAN LAW, 360 (1921); 1 Coke, INSTITUTES 191a, Butler's Note 77 V. (7) to 13th ed. (1787); Strickland v. Strickland, [1908] A.C. 551. Cf. Note 54, *supra*.

in tail forever.⁶⁶ So by 1330 the courts, by construction or extension of the statute *De Donis Conditionalibus*, had made possible the creation of perpetual, unbarrable entails. If they had been permitted to continue, all of the land in England might have become inalienable, and the withdrawal of land from commerce would probably have hampered seriously English commercial and industrial pre-eminence in later centuries.

Unbarrable entails lasted for a little less than two centuries after the enactment of the statute *De Donis Conditionalibus*. By 1472 the courts had decided that a tenant in tail in possession could bar both his heirs and the reversioner or remainderman by suffering a common recovery, a default judgment in a collusive suit brought by one who was feigned to have a title superior to that of the tenant in tail.⁶⁷ Within a few years, statutes of Henry VII and his son empowered the tenant in tail to levy a fine which would bar the heirs in tail but not the reversioner or remainderman.⁶⁸ A statute

⁶⁶ *Bastard v. Somer*, Y.B. 4 Edw. III, Trin., pl. 4 (1330); 3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 115-116 (1923).

⁶⁷ *Taltarum's Case*, Y.B. 12 Edw. IV, Mich. pl., 25 (1472). This case was decided the year after the short-lived restoration of Henry VI. At that time English law, unlike the Scots, did not permit forfeiture of entailed estates for treason. There is a tradition that the decision in *Taltarum's Case* was really a piece of royal legislation, dictated by Edward IV with a view to minimizing the amount of land which was exempt from forfeiture. Pigott, *COMMON RECOVERIES* 8-9 (1739). See note 72 *infra*. It was not wholly certain that a common recovery barred the reversion or remainder until the decision in *Capel's Case*, 1 Co. Rep. 61b, 76 Eng. Rep. 134 (1593). Stat. 34 & 35 Hen. VIII, c. 20, §2 (1542) nullified common recoveries where the king was reversioner or remainderman. Stat. 14 Eliz., c. 8, §2 (1572) made recoveries by a tenant in tail after possibility of issue extinct ineffective against the reversioner or remainderman.

⁶⁸ Stat. 4 Hen. VII, c. 24 (1487), as explained by Stat. 32 Hen. VIII, c. 36 (1540). The statute excepts estates tail created by the king while the reversion remains in the king. Statutory permission was necessary because *De Donis Conditionalibus* had provided that a fine levied to bar an estate tail should be void both as to the heirs and as to the reversioner. Stat. 13 Edw. I, c. 1, §4 (1285), restated, Stat. 1 Ric. III,

of 1540 empowered the tenant in tail in possession to bind the heirs in tail and the reversioner or remainderman by leases for terms not in excess of three lives or twenty-one years reserving substantial rent.⁶⁹

When the law of trusts was developed in the sixteenth and seventeenth centuries, it was assumed that a trust or equitable estate could be entailed as well as a legal estate. In such case it was settled that a *cestui que trust* in tail who was in possession could bar the equitable entail and the equitable reversion or remainder by suffering a common recovery⁷⁰ and that a *cestui que trust* in tail could bar his issue by levying a fine as fully as if he had the legal estate.⁷¹ Thus by the end of the sixteenth century a tenant in tail, although restricted to special forms of conveyance, was able to transfer *inter vivos* a fee simple or any lesser estate. The inheritance could not, however, be reached by his creditors,⁷² and

c. 7, §5 (1483). The fine, which was a compromise of record of a collusive action brought against the tenant in tail, was used when the tenant in tail was himself the reversioner or remainderman or was conveying to the reversioner or remainderman, and when the tenant in tail was such in reversion or remainder as, prior to Stat. 14 Geo. II, c. 20, §1 (1741), only a tenant in tail in possession could suffer a common recovery. 1 Coke, INSTITUTES 121a (Hargrave's Note No. 172 to 13th ed., 1787). It should be noted that the issue in tail could also be barred in some situations, without common recovery or statutory fine, by the operation of the highly technical rules of warranty. As this operation was frequently dependent upon the occurrence of events which could not be foreseen at the time of the conveyance, these rules cannot have contributed a great deal to the alienability of entailed land. *Id.*, 371a-377a, 391b-393b. Bordwell, "Alienability and Perpetuities," 24 IOWA L. REV. 1 at 44-50 (1938).

⁶⁹ 32 Hen. VIII, c. 28, §§1, 2 (1540), continued in force by Stat. 34 & 35 Hen. VIII, c. 20, §4 (1542).

⁷⁰ North v. Way, 1 Vern. 13, 23 Eng. Rep. 270, *sub nom.* North v. Williams, 2 Ch. Ca. 63, 78, 22 Eng. Rep. 848, 855 (1681).

⁷¹ Basket v. Pierce, 1 Vern. 226, 23 Eng. Rep. 431 (1683).

⁷² Except the king, claiming under judgment or specialty. Stat. 33 Hen. VIII, c. 39, §75 (1541). Stat. 21 Jac. I, c. 19, §12 (1623) enabled creditors to reach estates tail through bankruptcy proceedings. Estates tail, but not the reversion or remainder following them, were subjected

its descent according to the limitations of the entail could not be affected by will.⁷³

As has been seen, restraints on alienation assume two general forms, the prohibition, which, if effective, would compel the owner of a property interest to keep it despite his attempts to transfer, and the imposition of a penalty, usually forfeiture of the interest, upon alienation. Insofar as it is a restraint upon alienation, entailment is essentially of the prohibitory type. The case law of the fifteenth century and the statutes of the fifteenth and sixteenth made the prohibition on alienation implicit in entailment completely ineffective as to transfers by way of common recovery, fine levied under the statutes of Henry VII and his successor, and leases for periods not exceeding three lives or twenty-one years. The peculiar mediaeval rules of seisin also made the prohibition partially ineffective as against the more ordinary modes of conveyance. If a tenant in tail conveyed an estate of inheritance or *pur autre vie* by feoffment, release, confirmation, or common-law fine, not levied under the statutes, his act, although tortious and not a complete bar to the issue in tail or the reversioner or remainderman, was fully effective for the term of his life and worked a discontinuance of the estates of the issue and the reversioner or remainderman. That is, the right of entry which the issue or the reversioner or remainderman would otherwise have had upon the death of the tenant in tail was destroyed and he left with only a mere chose in action, the right to bring an action of formedon.⁷⁴

to forfeiture for treason of the tenant in tail by Stat. 26 Hen. VIII, c. 13, §5 (1534) and 33 Hen. VIII, c. 20 §3 (1541). See Dalrymple, *GENERAL HISTORY OF FEUDAL PROPERTY*, 2d ed., cc. 3, 4 (1758).

⁷³ Stat. 34 & 35 Hen. VIII, c. 5, §3 (1542).

⁷⁴ 1 Coke, *INSTITUTES* 325b-327b; 1 Cruise, *DIGEST* 89; Maitland, "The Beatitude of Seisin," 4 *L.Q. REV.* 24, 286, 297-298 (1888).

It having been settled that entailment was largely ineffective as a prohibition on alienation, questions soon arose as to the extent to which a donor in tail could impose penalties on alienation.

As might be expected, the decisions rendered before 1472 had held valid conditions providing for forfeiture of an estate tail upon alienation by the tenant in tail. This continued to be the rule, even as to alienations by way of common recovery or statutory fine, until the end of the sixteenth century, although there is evidence of growing recognition of the fact that to hold such conditions valid as against common recoveries and statutory fines would operate to defeat these methods of barring the entail and recreate perpetual unbarrable entails.⁷⁵ The old decisions were overruled early in the seventeenth century, and it was settled that no restraint by way of penalty, by forfeiture or otherwise, could be imposed upon the right of a tenant in tail to bar the

⁷⁵ Anonymous, Y.B. 21 Hen. VI, Hil. pl. 21 (1443); Anonymous, Y.B. 8 Hen. VII, Hil. pl. 3 (1493); Anonymous, Y.B. 10 Hen. VII, Mich. pl. 28 (1494); Anonymous, Y.B. 13 Hen. VII, Pasch. pl. 9 (1498); Newis v. Lark, 2 Plow. 403, 75 Eng. Rep. 609 (1571) (condition good against common recovery); Earl of Arundel's Case, 3 Dyer 342b, 73 Eng. Rep. 771, Jenk. 242, 145 Eng. Rep. 170 (1575) (dictum in the report in Jenkins, p. 243, that condition bad against common recovery); Croker v. Trevithin, Cro. Eliz. 35, 78 Eng. Rep. 301 (1584); Rudhall v. Milward, Moore K.B. 212, 72 Eng. Rep. 537, *sub nom.* Ruddall v. Miller, 1 Leon. 298, 74 Eng. Rep. 271 (1586) (condition good against fine); Spittle v. Davie, 2 Leon. 38, 74 Eng. Rep. 339 (1588) (condition good against lease); Arton v. Hare, Poph. 97, 79 Eng. Rep. 1207 (1595) (condition against "going about to alien, sell, grant or give or to suffer any recovery or levy any fine" assumed to be good); Sharington v. Minors, Moore K.B. 543, 72 Eng. Rep. 746 (1599) (condition against mortgage, sale or pledge good. Popham, C. J., dissented on the ground the condition was "encounter ley" and void). A proviso that the estate should cease only as to the offending tenant in tail and pass to his heir was ineffective, not because of the restraint on alienation but because of technical common-law rules preventing an estate from being forfeited in part. Germin v. Ascot, Moore K.B. 364, 72 Eng. Rep. 631 (1594); Cholmeley v. Humble, Moore K.B. 592, 72 Eng. Rep. 778 (1595); Corbet's Case, 1 Co. Rep. 83b, 76 Eng. Rep. 187 (1599); Mildmay's Case, 6 Co. Rep. 40a, 77 Eng. Rep. 311 (1605).

entail by statutory fine or to bar both the entail and the reversion or remainder by common recovery.⁷⁶ Whether exercise by a tenant in tail of his statutory power to make leases for three lives or twenty-one years could be penalized was not definitely settled.⁷⁷ A covenant by the donee in tail not to bar the entail was not specifically enforceable⁷⁸ but might give rise to an action for damages.⁷⁹ The seventeenth century decisions did not overrule those of the preceding centuries insofar as the latter held valid restraints by way of penalty upon tortious feoffments and other conveyances which worked a discontinuance but did not bar the entail.⁸⁰

As a common recovery could not be suffered by a tenant for years, attempts were soon made to create an unbarrable entail in estates for long terms of years. These attempts were frustrated by decisions that estates for years could not be entailed and that the first donee in tail owned the entire term with full power of aliena-

⁷⁶ *Sonday's Case*, 9 Co. Rep. 127b, 77 Eng. Rep. 915 (1611) (common recovery); *Portington's Case*, 10 Co. Rep. 35b, 77 Eng. Rep. 976 (1613) (common recovery); *Foy v. Hynde*, Cro. Jac. 697, 79 Eng. Rep. 605 (1624) (fine); *King v. Burchall*, Amb. 379, 27 Eng. Rep. 252 (1759) (common recovery). The first three cases involved penalties of forfeiture, the last a penalty by way of an equitable charge on the entailed land. Bordwell, "Alienability and Perpetuities," 24 IOWA L. REV. 59-66 (1938). *Accord*: PROPERTY RESTATEMENT §408 (1944). Justice Christiancy's classic opinion in *Mandlebaum v. McDonell*, 29 Mich. 78 at 93-94 (1874), quotes the reasoning in *Portington's Case* and cites that in *Mildmay's Case* with approval.

⁷⁷ Cf. *Spittle v. Davie*, 2 Leon. 38, 74 Eng. Rep. 339 (1588); 1 Coke, INSTITUTES 223b, with contrary dicta in *Mildmay's Case*, 6 Co. Rep. 40a, 43a, 77 Eng. Rep. 311, 317 (1605); *Portington's Case*, 10 Co. Rep. 35b, 39a, 77 Eng. Rep. 976, 982 (1613).

⁷⁸ *Collins v. Plummer*, 2 Vern. 635, 23 Eng. Rep. 1015, 1 P. Wms. 104, 24 Eng. Rep. 313 (1708).

⁷⁹ *Ibid.*; *Freeman v. Freeman*, 2 Vern. 233, 23 Eng. Rep. 751 (1691). But see *Poole's Case*, cited in *Tatton v. Mollineux*, Moore K.B. 809, 810, 72 Eng. Rep. 920 (1610).

⁸⁰ 1 Coke, INSTITUTES 223b-224a, and Butler's note No. 132 to 13th ed. (1787). See *Anonymous*, 1 Brownl. & Golds. 45, 123 Eng. Rep. 655 (1616); *Pierce v. Win*, 1 Ventr. 321, 86 Eng. Rep. 208 (1677).

tion.⁸¹ As the statute *De Donis Conditionalibus* applied only to land, chattels personal could not be entailed.

B. THE MICHIGAN STATUTES

On March 2, 1821, the Governor and Judges of the Territory of Michigan adopted a law providing that all estates tail were abolished and that all persons holding or to hold land under any devise, gift, grant, or conveyance which did, or which, but for the law would, create a fee tail, should "be seized thereof as an allodium."⁸² This law was in force until superseded by a provision of the Revised Statutes of 1838 that:

⁸¹ *Tatton v. Mollineux*, Moore K.B. 809, 72 Eng. Rep. 920 (1610); *Lovies's Case*, 10 Co. Rep. 78a, 77 Eng. Rep. 1043 (1613); *Sanders v. Cornish*, Cro Car. 230, 79 Eng. Rep. 801 (1631); *Grig v. Hopkins*, 1 Sid. 37, 82 Eng. Rep. 955 (1661).

⁸² Code of 1820, p. 393; Laws of 1827, p. 261; Laws of 1833, p. 278; 1 Terr. Laws, p. 815. Sections 1 and 2 of the law provide:

"Sec. 1. *Be it enacted by the Governor and Judges of the Territory of Michigan*, That all estates tail shall be, and are hereby abolished; and that in all cases, where any person or persons now is, or are seized in fee tail of any lands, tenements or hereditaments, such person or persons shall be deemed to be seized of an allodial estate; *And further*, in all cases where any person or persons would, if this act had not been passed, at any time hereafter become seized in fee tail of any lands, tenements or hereditaments, by virtue of any devise, gift, grant or other conveyance, heretofore made or hereafter to be made or by any other means whatsoever, such person or persons, instead of becoming seized thereof in fee tail, shall be deemed and adjusted to be seized thereof as an allodium.

"Sec. 2. *And be it further enacted*, That where lands, tenements or hereditaments, heretofore have been devised, granted or otherwise conveyed by a tenant in tail, and the person or persons, to whom such devise, grant or other conveyance, hath been made, his, her, or their heirs or assigns, hath or have, from the time such devise took effect, or from the time such grant or other conveyance was made, to the day of the passing of this act, been in the uninterrupted possession of such lands, tenements or hereditaments, and claiming and holding the same under or by virtue of such devise, grant or other conveyance, then such devise, grant or other conveyance shall be deemed as good, legal and effectual, to all intents and purposes, as if such tenant in tail had at the time of the making of such devise, grant or other conveyance, been seized of such lands, tenements or hereditaments allodially, any law to the contrary hereof notwithstanding."

"All estates tail are abolished, and every estate which would be adjudged a fee tail, according to the law of the territory of Michigan, as it existed before the second day of March, one thousand eight hundred and twenty-one, shall, for all purposes, on and after the said second day of March, be adjudged a fee simple."⁸³

There are two difficulties with the Act of 1838: (1) If the statute *De Donis Conditionalibus* was not in force immediately before March 2, 1821, it is possible that no estate would, at that time, have been adjudged a fee tail;⁸⁴ and (2) It is not clear whether a conveyance (if any could be) affected by the Act of 1838 created a fee simple conditional or a fee simple absolute. The second difficulty has been eliminated by the present statute, but the first remains. It may be argued that both the provisions of the Revised Statutes of 1838 and those of the statute now in force should be considered practical nullities, since no conveyance could fall within their terms and that, therefore, a conveyance which would have created an estate tail under the statute *De Donis Conditionalibus*, would now create an estate in fee simple conditional. Since March 1, 1847, the following provisions have been on the Michigan statute books:

"Sec. 3. All estates tail are abolished, and every estate which would be adjudged a fee tail, according to the law of the territory of Michigan, as it existed before the second (2nd) day of March, one thousand eight hundred and twenty-one (1821), shall for all purposes be

⁸³ P. 258.

⁸⁴ It would seem that the term "fee tail" was sometimes used before the statute *De Donis Conditionalibus* in reference to conditional fees other than the *maritagium*. 2 Pollock & Maitland, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 19, n. 6 (1895); Plucknett, *CONCISE HISTORY OF THE COMMON LAW* 353-357 (1929). An application of the Michigan statutes to such fees tail only, leaving the *maritagium* in existence as a fee simple conditional, would be awkward to say the least.

adjudged a fee simple; and if no valid remainder be limited thereon, shall be a fee simple absolute.

"Sec. 4. When a remainder in fee shall be limited upon any estate which would be adjudged a fee tail according to the law of the territory of Michigan as it existed previous to the time mentioned in the preceding section, such remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession, on the death of the first taker, without issue living at the time of such death."⁸⁵

As has been shown, estates in fee tail as that term is understood in the developed common-law system are a creation of the statute *De Donis Conditionalibus*. These statutory provisions only purport to affect estates "which would be adjudged a fee tail, according to the law of the territory of Michigan, as it existed before the second (2nd) day of March . . . 1821". Yet despite dicta suggesting that no English statutes ever were in force in Michigan and positive decisions that if any were in force they were repealed by the Act of September 16, 1810,⁸⁶ the Supreme Court of Michigan has consistently applied these statutory provisions to conveyances which would

⁸⁵ Rev. Stat. 1846, c. 62, §§3, 4; Comp. Laws (1857) §§2587, 2588; Comp. Laws (1871) §§4070, 4071; Comp. Laws (1897) §§8785, 8786; How. Stat., §§5519, 5520; Comp. Laws (1915) §§11521, 11522; Comp. Laws (1929) §§ 12923, 12924; Mich. Stat. Ann. §§26.3, 26.4; Comp. Laws (1948) §§554.3, 554.4.

Six other states have similar statutes: Cal. Civ. Code (Deering, 1949) §§763, 764; Mont. Rev. Code (1935) §§6725, 6726; N. Y. Real Property Law (1909) §32; N.D. Rev. Code (1943) §§47-0405, 47-0406; Okla. Stat. (1941) tit. 60 §§24, 25; S.D. Code (1939) §§51.0405, 51.0406. The New York statute was construed in the following cases: *Wilkes v. Lion*, 2 Cow. 333 (1823); *Grout v. Townsend*, 2 Denio 336 (1845); *Van Rensselaer v. Poucher*, 5 Denio 35 (1847); *Wendell v. Crandall*, 1 N.Y. 491 (1848); *Emmons v. Cairns*, 3 Barb. 243 (1848); *Lott v. Wykoff*, 2 N.Y. 355 (1849); *Barlow v. Barlow*, 2 N.Y. 386 (1849); *Brown v. Lyon*, 6 N.Y. 419 (1852); *Barnes v. Hathaway*, 66 Barb. 452 (1873); *Buel v. Southwick*, 70 N.Y. 581 (1877); *Jenkins v. Fahey*, 73 N.Y. 355 (1878); *Coe v. De Witt*, 22 Hun. 428 (1880); *Alger v. Alger*, 31 Hun. 471 (1884).

⁸⁶ Note 40 *supra*.

have created fees tail under the statute *De Donis Conditionalibus*.⁸⁷

The effect of the Act of 1821 abolishing estates tail came before the Supreme Court only once, in *Fraser v. Chene*.⁸⁸ This was a suit in chancery to quiet title to land involving the construction of a will, which was executed and became effective in 1829, reading:

"I give and bequeath unto my beloved son, Gabriel Chene, my eldest, the farm I now reside on, for and during his life-time, with all the appurtenances thereon; and after he, my said son, the said Gabriel Chene, is deceased, then the right, title and appurtenances of the aforesaid farm, is to become the property of the said Gabriel Chene's male heirs,"

The plaintiff claimed under a deed from Gabriel Chene which purported to convey a fee simple. The defendants, who were the sons and heirs of Gabriel Chene, contended that this devise created a life estate in Gabriel, with remainder in fee simple absolute to his male heirs. On this point the court decided that the Rule in Shelley's Case was in force in Michigan in 1829;⁸⁹ in consequence of which the devisee, Gabriel

⁸⁷ *Fraser v. Chene*, 2 Mich. 81 (1851); *Goodell v. Hibbard*, 32 Mich. 47 (1875); *Eldred v. Shaw*, 112 Mich. 237, 70 N.W. 545 (1897); *Downing v. Birney*, 112 Mich. 474, 70 N.W. 1006 (1897); *Rhodes v. Bouldry*, 138 Mich. 144, 101 N.W. 206 (1904); *Millard v. Millard*, 212 Mich. 662, 180 N.W. 429 (1927); *Thompson v. Thompson*, 330 Mich. 1, 46 N. W. (2d) 437 (1951).

⁸⁸ 2 Mich. 81 (1851).

⁸⁹ The Rule in Shelley's Case was abolished by Rev. Stat. 1838, p. 258, which was replaced by a clearer provision, still in force, Rev. Stat. 1846, c. 62, §28, Comp. Laws (1857) §2612; Comp. Laws (1871) §4095; Comp. Laws (1897) §8810; How. Stat. §5544; Comp. Laws (1915) §11546; Comp. Laws (1929) §12948; Mich. Stat. Ann §26.28; Comp. Laws (1948) §554.28. Accordingly, it was held in *Wilson v. Terry*, 130 Mich. 73, 89 N.W. 566 (1902), and *Thompson v. Thompson*, 330 Mich. 1, 46 N.W. (2d) 437 (1951), that a conveyance to A for life, remainder to the heirs of his body, created only a life estate in A, with remainder in fee simple in the heirs of his body.

Chene, took a fee. The court held further that the wording was such as would have created an estate in fee tail male prior to March 2, 1821. The Act of that date was construed to convert this into an "allodial" estate, which the court assumed to mean an estate in fee simple absolute.

The section of the Revised Statutes of 1838 abolishing entails was never considered in a reported decision, but the provisions of the Revised Statutes of 1846, which are now in force, have been construed in several cases. *Downing v. Birney*⁹⁰ involved a deed between James G. Birney

"And Lorainie Spicer, wife of Ezekiel Spicer, of the same place, of the second part, witnesseth, that, in consideration of one hundred dollars paid by the said Ezekiel Spicer to the parties of the first part, they have bargained and sold and do hereby convey to the said Lorainie Spicer . . . lots To have and to hold the said lots to the said Lorainie, to the children of her body begotten by the said Ezekiel, to her heirs, executors, and to the assigns of the said Lorainie and Ezekiel, forever; and the said James G. Birney, for himself, his heirs, executors and administrators, hereby covenant and agree that he will at all times defend the lawful title hereby conveyed, to the said lots, of the said Lorainie, to the children of her body begotten by the said Ezekiel, to her heirs, executors, and to the assigns of the said Lorainie and Ezekiel, against the claim or claims of all persons whomsoever."

The court held that this instrument was not designed to create a fee tail and that, therefore, the statutory provisions in question had no bearing. The deed was construed to vest: (1) A life estate in Lorainie; (2) A life estate in the children of Lorainie by Ezekiel in being

⁹⁰ 112 Mich. 474, 70 N.W. 1006 (1897), 117 Mich. 675, 76 N.W. 125 (1898), Part Three, note 49, *infra*.

at the date of the deed, to take effect on the death of Lorainie; and (3) A remainder in fee simple absolute in Lorainie, to take effect on the death of the last of her children by Ezekiel.

Section 3 of Chapter 62 of the Revised Statutes of 1846, which converts a fee tail upon which no remainder is limited into a fee simple absolute, has been applied for this purpose only twice. In *Rhodes v. Bouldry*⁹¹ a devise reading:

"I bequeath the above described lands, not only to the said Silas W. Bouldry, but to the heirs of his body." was construed to be one which would have created a fee tail under the statute *De Donis Conditionalibus* and which, therefore created a fee simple absolute. The other case, *Millard v. Millard*,⁹² involved the construction of a warranty deed containing the following language:

"This indenture made the 27th day of July in the year of our Lord one thousand eight hundred forty-six, between Moses Dean, of the county of Ionia and State of Michigan, of the first part, and Charity Millard and her children, heirs of her body, of the second part To have and to hold, the above-mentioned and described premises, with the appurtenances, and every part and parcel thereof, to the said parties of the second part, their heirs and assigns forever."

The court failed to consider the fact that the language of the *habendum* indicated an intent that there should really be several grantees. Regarding the words "and her children" as mere surplusage, it determined that, since the magical words "heirs of her body" were present, the conveyance was one which would have created

⁹¹ 138 Mich. 144, 101 N.W. 206 (1904). See *Thompson v. Thompson*, note 89 *supra*.

⁹² 212 Mich. 662, 180 N.W. 429 (1920).

a fee tail under the statute *De Donis Conditionalibus* and which was transformed into a fee simple absolute by "3 Comp. Laws 1915, S. 11521". It is to be noted that the statutory provision applied by the court to a deed executed in 1846 was that of the Revised Statutes of 1846, which did not become effective until March 1, 1847. The provision of the Revised Statutes of 1838 should have been applied but the effect, no doubt, would have been the same.⁹³

At the ancient common law, no remainder could be limited on an estate in fee simple conditional.⁹⁴ The right retained by the donor was a mere possibility and inalienable. It was not clear at first that the statute *De Donis Conditionalibus* permitted the limitation of a remainder upon the newly created estate in fee tail, but it was soon settled that it did.⁹⁵ It will be remembered that since 1847 the Michigan statute has provided that a remainder in fee limited on what would have been a fee tail takes effect as a contingent limitation on a fee and vests in possession on the death of the first taker, without issue living at the time of such death.⁹⁶ It is to be noted that the mere birth of issue has no effect under this provision. If the donee in tail dies with issue, his heirs, devisees, or assigns take in fee simple absolute; if he dies without issue, the remainderman takes in fee simple absolute. One peculiar effect of this provision would seem to be that the issue of the donee in tail may never

⁹³ There is some possibility, however, that the 1846 Act might be construed to be retroactive and valid as such, at least in some situations. See "Estates Tail in the United States," 24 HARV. L. REV. 144 (1910). The 1821 Act clearly purported to be retroactive.

⁹⁴ 2 BLACKSTONE'S COMMENTARIES *164, 165. But see 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 18 (1923). The modern American cases are collected in 114 A.L.R. 616. See Part Two, note 7, *infra*.

⁹⁵ Note 60 *supra*; 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 18 (1823).

⁹⁶ Note 84 *supra*.

inherit, even though they survive the donee: their rights are liable to be cut off by *inter vivos* conveyance of the donee in tail, by his will, or, in part, by provisions of the statutes of descent and distribution.

The provision first received the attention of the Supreme Court in *Goodell v. Hibbard*,⁹⁷ which was an action of ejectment founded on a will containing this devise:

"Second, I give and devise all the rest, residue and remainder of my real and personal estate, of every name and nature whatsoever, to my sister, Betsey Goodell, . . . ; to have and to hold the said premises, which is described in several deeds, to the said Betsey Goodell and her heirs, forever; and in failure of heirs, all to fall and be bequeathed to the minor children of Alexander Goodell, now deceased,"

Alexander Goodell was a brother of the testator who had pre-deceased him, leaving four minor children. The plaintiffs claimed under a bargain and sale deed, the only covenant of which was one of seizin, executed by one of these children before the death of Betsey Goodell. The court, taking into consideration the fact that Betsey Goodell was an aging spinster with a large number of collateral heirs presumptive at the time the will was executed, determined that the word "heirs", as used in the will, meant "heirs of her body". In consequence, the estate created was held to be what would have been a fee tail in Betsey with remainder in fee simple absolute in the children of Alexander. Applying the statute, the land passed to the children of Alexander in fee simple absolute upon the death of Betsey without issue.

⁹⁷ 32 Mich. 47 (1875). It should be noted that, in this case, the contingent estate created by §4 of the statute was held to be alienable before taking effect in possession. See also *Mullreed v. Clark*, 110 Mich. 229, 68 N.W. 138, 989 (1896).

*Eldred v. Shaw*⁹⁸ was a suit to construe a will devising land to a trustee for "my grandson, Rata Eldred", with directions to manage and control until the grandson should reach the age of twenty-one,

"and, in the case of the death of my said grandson without heirs by his body begotten, the lands and property above described, with all its increases or accretions, I give, devise and bequeath to my said sons, Lyxander, Henry, and William, and my said daughters, Matilda and Sally, share and share alike, and to their heirs and assigns forever."

The grandson contended that the gift over to his uncles and aunts would be effective only if he died during minority and that, upon reaching majority, he became vested with title in fee simple absolute. The circuit judge agreed with this contention but, on appeal, it was held that the devise created an estate tail general with remainder over which, by force of the statute, became a fee simple subject to a contingent limitation over if the tenant should die at any time, before or after reaching majority, without issue him surviving.

It would seem then that the statutory provision affecting remainders limited upon estates tail will be enforced in accordance with its terms. Its application to estates in fee tail general not restricted to issue of a particular sex is not difficult. As to the more complicated forms of estates tail the effect of the statute is far from clear. Suppose a conveyance to *A* and the heirs male of his body, remainder to *B* and his heirs, forever. If *A* dies

⁹⁸ 112 Mich. 237, 70 N.W. 545 (1897). In *Coe v. De Witt*, 22 Hun. 428 (1880), testator devised land to "Edward B. Coe, and the heirs of his body forever, and in case of his death without issue then living" to certain charities. Edward B. Coe conveyed the land in his lifetime and then died, leaving a surviving daughter. It was held that the grantee of Edward took a fee simple absolute upon the death of Edward, leaving issue.

leaving a daughter as his only descendant, does *B* take? A similar problem would be created by a gift to *A* and the heirs of his body begotten of a particular wife, remainder to *B* and his heirs, forever, if *A* should die leaving only issue by another wife. Presumably, in these cases, the remainder would take effect in possession if, at the time of the first taker's death, he had not issue of the particular class named in the conveyance.

Under Michigan law, then, the entail is completely ineffective as a prohibition on alienation, except that, when a remainder is limited after an estate tail, the donee in tail cannot, as he could in England after 1472, bar the remainder. The remainderman can, however, transfer his interest.⁹⁹ As the statutes convert the estate of the donee in tail into a fee simple, the rules which govern the validity of restraints on alienation of fees simple apply to that estate. If the remainder is in tail, the same conversion occurs. The validity of restraints on alienation of the remainder is governed, therefore, by the rules applicable to expectant estates of types other than the fee tail.¹⁰⁰

⁹⁹ Note 97 *supra*.

¹⁰⁰ For periodical material on the treatment of fee tail in other jurisdictions, see: Morris, "Primogeniture and Entailed Estates in America," 27 COL. L. REV. 24-51 (1927); Lundberg, "Barring of Entails, Its Marks on Our Land Laws," 3 DAKOTA L. REV. 160-164 (1930); Redfearn, "Estates Tail in Florida," 6 FLA. L.J. 69-78 (1932); Costigan, "Equitable Fee Tail Estates—Illinois Fee Tail Statute—Shall Equity Follow the Law?" 5 ILL. L. REV. 514 (1911); Beals, "Estates Tail in Kansas," 1 J. BAR A. KAN. 203-209 (1933); Turner, "Estates Tail in Kansas," 2 J. BAR A. KAN. 241-256 (1934); Hudson, "Estates Tail in Missouri," 7 ILL. L. REV. 355 (1913); Steiner, "Estates Tail in Missouri," 7 KANSAS CITY L. REV. 93-108 (1939); Holmsted, "Estates Tail," 22 CAN. L.T. 426 (1902); Sanger, "Estates Tail Under the New Law," 2 CAMB. L.J. 212 (1925); "Estates Tail in the United States," 15 COL. L. REV. 618 (1915).

CHAPTER 3

Present Legal Estates in Fee Simple

A. THE ENGLISH LAW

AT THE beginning of the thirteenth century, when the royal courts of justice were acquiring effective control of the development of private law, the possible forms of action and their limits were uncertain. It seemed then that a new form of action could be devised to fit any need which might arise. In the course of that century the courts set themselves to limiting the possible forms of action to a definite list, defining with certainty the scope of permitted actions, and so refusing relief upon states of fact which did not fall within the fixed limits of permitted forms of action. This process, of course, operated to fix and limit the classes of private rights protected by law.¹⁰¹

A parallel process went on with respect to interests in land. At the beginning of the thirteenth century, when alienation of land was becoming possible, it seemed that any sort of interest which ingenuity could devise might be created by apt terms in the transfer creating the interest. Perhaps the form of the gift could create interests of any specified duration, with peculiar rules for descent, with special rights not ordinarily incident to ownership, or deprived of some of the ordinary incidents of ownership. As in the case of the forms of action, the courts set themselves to limiting the possible interests in land to a definite list, defining with certainty

¹⁰¹ Maitland, *FORMS OF ACTION AT COMMON LAW* 51-52 (reprint 1941).

the incidents of permitted interests, and refusing to enforce provisions of a gift which would add to or subtract from the fixed incidents of the type of interest conveyed. The law would recognize only a certain definite list of estates in land, each with fixed incidents, and every gift must be forced to fit the Procrustean bed of one or another of these estates.¹⁰² The effect of this process in reducing widely varying types of *maritagium* and entail to one estate in fee simple conditional with a fixed incident of alienability after birth of issue has been shown in the preceding chapter. The statute *De Donis Conditionalibus* checked the process of systematization insofar as that process tended to impose one canon of descent and a uniform rule of alienability upon all estates of inheritance. Beyond this it did not stop the rigid fixation of estates and their incidents. With respect to duration, the recognized types of estates came to be limited to those in fee simple, in fee tail, for life, for years, at will, and at sufferance. As to these, the courts would permit slight variations in non-essential incidents, but none whatever in those considered essential. And an incident formally conferred by statute was almost necessarily deemed essential. A provision purporting to deprive the estate granted of an essential incident was repugnant to the grant and void. For example, it was settled by the

¹⁰² 2 Holdsworth, *HISTORY OF ENGLISH LAW*, 4th ed., 349-352 (1936); 3 *id.*, 3d ed., 101-105 (1923); Bordwell, "Alienability and Perpetuities," 22 *IOWA L. REV.* 437 at 444-445 (1937). "For the sake of certainty and stability, the law has classified and defined all the various interests and estates in lands which it recognizes the right of any individual to hold or create, and the definition of each is made from, and the estate known and recognized by the combination of certain legal incidents, many of which are so essential to the particular species of estate that they cannot, by the parties creating it, be severed from it, as this would be to create a new and mongrel estate unknown to the law, and productive of confusion and uncertainty." Christiancy, J., in *Mandlebaum v. McDonell*, 29 Mich. 78 at 92 (1874).

first decade of the seventeenth century that every estate in fee tail was endowed by law with certain inseparable incidents, that among these incidents were dower, curtesy, and the right to bar the entail by common recovery, and that any provision purporting to deprive an estate tail of any of these incidents or penalize its enjoyment was void.¹⁰³

As has been seen, the Statute of Westminster III, *Quia Emptores Terrarum*, made two important provisions as to estates in fee simple; first, that the donor of such an estate could not retain a reversion, and second, that the owner might "sell at his own pleasure his lands and tenements, or part of them."¹⁰⁴ A remainder being analogous to a reversion,¹⁰⁵ the first provision operated to prevent the limitation of a remainder after a fee simple.¹⁰⁶ That the statute made free alienability an inseparable incident of every estate in fee simple seems always to have been assumed by the judges and lawyers of England. Knowing this, and realizing that such an attempt would be nugatory, English conveyancers have not attempted to restrain alienation of legal estates in fee simple by

¹⁰³ Sir Anthony Mildmay's Case, 6 Co. Rep. 40a, 41a, 77 Eng. Rep. 311, 314 (1605); Mary Portington's Case, 10 Co. Rep. 35b, 38b-39a, 77 Eng. Rep. 976, 982 (1613).

¹⁰⁴ Stat. 18 Edw. I, stat 1, c. 1 (1290); 2 Coke, INSTITUTES 66, 67. The language of the statute, as printed in the Statutes at Large, is, "quod de cetero liceat unicuique libero homini terram suam seu tenementum seu partem inde pro voluntate sua vendere." In *Mayn v. Cros*, Y.B. 14 Hen. IV, Mich., pl. 6 (1412), Justice Hankford said, at f. 3b, "le statute voit, 'Quod quilibet liber homo possit dare et vendere terram suam.'" Sir Edward Coke (whose version of the statute varies slightly from that of the Statutes at Large) says, "'Vendere' is here not onely taken for a sale, but for any alienation by gift, feoffment, fine, or otherwise: But sale was the most common assurance." 2 INSTITUTES 501.

¹⁰⁵ 1 Coke, INSTITUTES 373b (Butler's Note No. 328 to 13th ed. 1787); Bordwell, "Alienability and Perpetuities," 24 IOWA L. REV. 635 at 655-656 (1939).

¹⁰⁶ 1 Fearn, CONTINGENT REMAINDERS, 5th ed., 7 (1794); Part Two, note 7, *infra*.

prohibition, and there is a consequent dearth of English decisions as to such restraints. American lawyers have not always understood so well the system of estates, and conveyancing by laymen has been more common here. By the overwhelming weight of authority in this country, a prohibition on alienation of a legal fee simple, that is, a provision that a transfer by the owner shall be wholly inoperative and leave him still owner, is a nullity, whether extending to all alienation or limited to alienation in a particular manner, alienation during a limited period, or alienation to specified persons or classes of persons.¹⁰⁷

As to restraints by way of penalty, it has been settled in England since the fourteenth century that a proviso in a conveyance in fee simple that the estate shall be forfeited upon any alienation is void.¹⁰⁸ The same rule

¹⁰⁷ The cases are collected in Gray, *RESTRAINTS ON ALIENATION*, 2d ed., 91-133 (1895); Schnebly, "Restraints Upon the Alienation of Property," 6 *AMERICAN LAW OF PROPERTY*, §§26.15, 26.16 (1952); Manning, "The Development of Restraints on Alienation since Gray," 48 *HARV. L. REV.* 373-406 (1935); Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 *YALE L.J.* 961-995, 1186-1215 (1935). *Accord*: *PROPERTY RESTATEMENT* §405 (1944). The *Restatement* and Professor Schnebly refer to prohibitions on alienation as "disabling restraints." *Id.* §404. The statement in the text does not apply to provisions of a trust instrument restraining alienation by the trustee. As to these see Schnebly, 6 *AMERICAN LAW OF PROPERTY*, §26.13 and Chapter 8, *infra*.

¹⁰⁸ Anonymous, *Liber Assissarum* 33 Edw. III, pl. 11 (1359); Mayn v. Cros, Y.B. 14 Hen. IV, Mich., pl. 6 (1412); Anonymous Y.B. 21 Hen. VI, Hil., pl. 21 (1443); Anonymous, Y.B. 8 Hen. VII, Hil., pl. 3 (1493); Anonymous, Y.B. 10 Hen. VII, Mich., pl. 28 (1494); Anonymous, Y.B. 13 Hen. VII, Pasch., pl. 9 (1498); Vernon's Case, 4 Co. Rep. 1a, 3b, 76 Eng. Rep. 845, 854 (1572); Shailard v. Baker, Cro. Eliz. 744, 78 Eng. Rep. 977 (1600); Statham, *ABRIDGEMENT*, "Conditions," pl. 12 (1495); Brooke, *GRAUNDE ABRIDGEMENT*, "Conditions," pl. 57, 135, 239 (1573); 1 Coke, *INSTITUTES* 222b-223a. Shailard v. Baker involved a condition in a will, the other cases conditions in inter vivos conveyances. As in the case of estates tail, restraint by way of penalty on types of conveyance which had purely tortious operation, working a discontinuance, were upheld. Anonymous, Y.B. 10 Hen. VII, Mich., pl. 28 (1494); Brooke, *id.*, pl. 239.

obtains in this country.¹⁰⁹ Sir Thomas Littleton, writing in the fifteenth century, expressed the rule in this wise,

"Sect. 360. Also, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is infeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void."¹¹⁰

So much is clear. Unfortunately for the clarity of the law, Sir Thomas added,

"Sect. 361. But if the condition be such, that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc. then such condition is good."¹¹¹

Littleton's exception to the general rule was repeated by way of dictum in a case decided twelve years after the publication of his treatise,¹¹² but it seems inconsistent with the reasoning of the opinions which declare the general rule.¹¹³ Those cases hold that conditions in restraint of alienation of an estate in fee simple are void

¹⁰⁹ The cases are collected in Gray, *RESTRAINTS ON ALIENATION*, 2d ed., 8-25 (1895); Schnebly, "Restraints Upon the Alienation of Property," 6 *AMERICAN LAW OF PROPERTY*, §26.15 (1952) and the articles cited in note 107 *supra*. *Accord*: *PROPERTY RESTATEMENT* §406, comment *d*, §407 (1944).

¹¹⁰ *TENURES* §360 (1481).

¹¹¹ *Id.*, §361; 1 Coke, *INSTITUTES* 223a-223b. See Sheppard, *TOUCHSTONE ON COMMON ASSURANCES* 129-130 (1648); Sweet, "Restraints on Alienation," 33 *L.Q. REV.* 236 at 242-243 (1917).

¹¹² Anonymous, *Y.B.* 8 Hen. VII, Hil., pl. 3, f. 10b (1493), per Hussey, C.J.

¹¹³ Pearson, J., in *In re Rosher*, [1884] 26 Ch. Div. 801 at 813-814. Chancellor Kent says of this section, "But this case falls within the general principle, and it may be very questionable whether such a condition would be good at this day." 4 *COMMENTARIES* *131.

because, (1) they are repugnant to the grant, that is, their operation would tend to deprive the estate of the inseparable incident of alienability conferred upon it by the statute *Quia Emptores Terrarum*,¹¹⁴ and (2) restraints on alienation may be imposed only in favor of a reversion or remainder following the estate restrained, and, by force of the same statute, no reversion or remainder may follow a fee simple.¹¹⁵ In a case decided in 1443 Mr. Justice Paston argued that the existence of a reversion or remainder had no bearing, that restraints on alienation were void only because of "inconvenience."¹¹⁶ This view was decisively rejected, not only in that case but in the sixteenth and seventeenth century decisions which developed the law of restraints on alienation on estates in fee tail, for life and for years. Nevertheless, some modern writers, notably Professor John Chipman Gray, have tried to explain and support the law of restraints on alienation solely on the ground of public policy, rather than the technical common-law rules as to estates.¹¹⁷ No doubt there are objections of

¹¹⁴ Anonymous, *Liber Assissarum*, 33 Edw. III, pl. 11 (1359); *Mayn v. Cros*, Y.B. 14 Hen. IV, Mich., pl. 6 (1412); Anonymous, Y.B. 10 Hen. VII, Mich., pl. 28 (1494); Anonymous, Y.B. 13 Hen. VII, Pasch., pl. 9 (1498); *Shailard v. Baker*, Cro. Eliz. 744, 78 Eng. Rep. 977 (1600).

¹¹⁵ Yelverton, J., in Anonymous, Y.B. 21 Hen. VI, Hil., pl. 21 (1443); Hussey, C. J., in Anonymous, Y.B. 8 Hen. VII, Hil., pl. 3 (1493); Bordwell, "Alienability and Perpetuities," 23 IOWA L. REV. 1 at 11-13 (1938).

¹¹⁶ Anonymous, Y.B. 21 Hen. VI, Hil., pl. 21 (1443). He was contending that restraints on alienation in a lease for years are void, a contention long since overruled.

¹¹⁷ Gray, *RESTRAINTS ON ALIENATION*, 2d ed., 11 (1895); Sweet, "Restraints on Alienation," 33 L.Q. REV. 236, 243 (1917); Schnebly, "Restraints upon the Alienation of Legal Interests," 44 YALE L.J. 961-966 (1935); *PROPERTY RESTATEMENT*, Introductory Note to Div. IV, Part II, "Rationale." Manning, "The Development of Restraints on Alienation since Gray," 48 HARV. L. REV. 373-374 (1935), appears to recognize the inadequacy of public policy as an explanation of the law as it is, and Professor Schnebly's most recent study of the subject does likewise. "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.25 (1952).

public policy to a complete restraint on alienation of property for an extended period, but public policy alone does not explain the technical rules which govern restraints on alienation of estates in fee simple. For example, where, as in Michigan,¹¹⁸ the Rule in Shelley's Case has been abolished, it is possible to convey a life estate to John Stiles, remainder in fee simple to his heirs, with a proviso that if John transfers his life estate it shall be forfeited. Professor Gray would concede the validity of this penalty restraint upon the alienation of the life estate.¹¹⁹ On the other hand, if land is conveyed to John Stiles in fee simple with a proviso that if John transfers an estate for his own life his estate in fee simple shall be forfeited and the land pass to Andrew Baker for the life of John and then to John's heirs, the restraint upon alienation is in Professor Gray's opinion, void.¹²⁰ So far as removing land from commerce is concerned, one restraint has an effect which is virtually identical with that of the other. Public policy is no explanation of why one is good and the other bad. The true explanation was given us five hundred years ago by Mr. Justice Hankford, who pointed out that the statute *Quia Empfores Terrarum* conferred an inseparable incident of alienability upon every estate in fee simple,¹²¹ and by Mr. Justice Yelverton, who pointed out that the statute prohibited the retention of a reversion after a fee simple to which the restraint on alienation could be annexed.¹²²

Professor Maitland remarked, "The forms of action we have buried, but they still rule us from their

¹¹⁸ Note 89 *supra*.

¹¹⁹ RESTRAINTS ON ALIENATION, 2d ed., 72 (1895).

¹²⁰ *Id.* at 33-42.

¹²¹ Mayn v. Cros, Y.B. 14 Hen. IV, Mich., pl. 6 (1412).

¹²² Anonymous, Y.B. 21 Hen. VI, Hil., pl. 21 (1443).

graves.”¹²³ So it is with the doctrine of estates. The nineteenth century saw numerous efforts to abolish common-law rules of property, such as the Rule in Shelley’s Case, which operate to defeat intention. The theory behind such efforts seems to have been that the real, subjective intention of every testator and grantor should be carried out fully unless the effect of its execution is contrary to public policy. The success of these efforts, like the contemporary efforts to abolish the forms of action, has been much qualified. We may be thankful that it is so. The judges of the thirteenth century remembered a period when great stress had been laid upon carrying out the intention of the donor, no matter how whimsical or capricious, unless it contravened some ill-defined standard of public policy. They knew the effect of such a stress, namely, that there can be innumerable types of interests in land with widely varying and doubtful incidents; that the effect of a conveyance is uncertain until there has been litigation to determine the true intent of the donor and its compatibility with public policy. They sought to achieve simplicity and certainty as to titles by limiting the possible interests in land to a very few, with fixed and inseparable incidents. They must have known that, in doing so, they were defeating the intention of donors. But the land belongs to the living, not to the dead. The generation now alive should have certain titles and known rights of enjoyment, even at the expense of thwarting the expressed wish of some long-dead and half-forgotten testator or donor. The rules which Justices Hankford and Yelverton laid down were not unreasonable. The law of their day permitted perpetually inalienable estates in fee tail; why should it permit any other inalienable estate of inheritance? The owner of

¹²³ **FORMS OF ACTION AT COMMON LAW 2** (reprint 1941).

a reversion or vested remainder which is certain to become possessory within a relatively few years has a real interest in the personal characteristics of the tenant in possession; no one else has sufficient interest to warrant allowing him to interfere with alienation by the tenant in possession.

If the true basis of the rules governing restraints on alienation of estates in fee simple lies in the two provisions of the statute *Quia Emptores Terrarum*, no such restraint should be valid, and Mr. Justice Littleton's exception in Section 361 as to restraints limited to alienation to a named man, his heirs or issue, is wrong in principle. Even if it is sound, it should not be extended to restraints which are more comprehensive than the examples he gives. Littleton's statement in Section 360 of the general invalidity of restraints on alienation of fees simple describes a restraint which is limited in time to the lifetime of the feoffee.¹²⁴ Hence his statement that conditions which "do not take away all power of alienation"¹²⁵ are good cannot extend to restraints which are general in scope and limited only in duration.¹²⁶ Certainly it should not be extended to the converse of the example given, i.e., to a restraint upon all alienation except to a certain person.¹²⁷

Probably because it is inconsistent with the common-law doctrine of estates and so an unsure foundation for further development, Section 361 of Littleton's *Tenures*, asserting the validity of limited penalty restraints on alienation of estates in fee simple, has caused confusion

¹²⁴ Note 110 *supra*.

¹²⁵ Note 111 *supra*.

¹²⁶ *In re Rosher*, [1884] 26 Ch. Div. 801.

¹²⁷ *Mr. Serjeant Bridgman in Muschamp v. Bluet*, J. Bridg. 132 at 137, 123 Eng. Rep. 1253 at 1256 (1617).

in the law, both in England and in this country.¹²⁸ The *Restatement of Property* takes the position that a penalty restraint upon alienation of a legal possessory estate in fee simple is valid if (1) qualified so as to permit alienation to some though not all possible alienees, and (2) reasonable under the circumstances.¹²⁹ This rule denies the validity of restraints which are general in scope so far as alienees are concerned but qualified as to duration¹³⁰ or as to manner of alienation,¹³¹ but in other respects it does not provide a certain and definite standard against which to test the validity of limited restraints.

B. RESTRAINTS ON ALIENATION BY DEED

The Michigan statutes adopt the common-law classification of estates in land into estates of inheritance, estates for life, estates for years, and estates at will and by sufferance, and establish the estate in fee simple as the only permissible type of estate of inheritance.¹³² As these

¹²⁸ The English cases are collected in Sweet, "Restraints on Alienation," 33 L.Q. REV. 236-253, 342-362 (1917); the American cases in Gray, *RESTRAINTS ON ALIENATION*, 2d ed., 25-69 (1895); Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §§26.19 to 26.34 (1952) and the articles cited in note 107 *supra*. Much of the English confusion was eliminated by Justice Pearson's wise reliance in *In re Rosher*, [1884] 26 Ch. Div. 801 on the reasoning in Justice Christiancy's brilliant opinion in *Mandlebaum v. McDonell*, 29 Mich. 78 (1874).

¹²⁹ Sections 406, 407 (1944). This, in effect, means that a penalty restraint which permits alienation only to members of a very small group is void but one which permits alienation to anyone except members of a relatively small group is valid. This view is supported by considerable American authority. Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §§26.31 to 26.34 (1952).

¹³⁰ *Id.*, §406, comment *e*. This view is supported by the great weight of American authority. Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.19 (1952).

¹³¹ *Id.*, §406, comment *f*. See: Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.34 (1952).

¹³² Rev. Stat. 1846, c. 62, §§1 to 5; Comp. Laws (1857) §§2585 to 2589; Comp. Laws (1871) §§4068 to 4072; Comp. Laws (1897) §§8783

statutory provisions were adopted verbatim from the New York Revised Statutes of 1830, Chancellor Kent's remark, "The technical language of the common law was too deeply rooted in our usages and institutions, to be materially affected by legislative enactments,"¹³³ is apt. In adopting the common-law classification of estates, our legislature must have intended to give the terms the meaning they had at common law, that is, to adopt the common-law definitions and incidents of estates, except as they are modified by our statutes. So far as legal estates are concerned, our statutory modifications tend to increase alienability. They certainly do not favor restrictions upon it. The incidents of an estate in fee simple were fixed in part by the statute *Quia Emptores Terrarum*. The term "fee simple" has no meaning in the developed common law without assuming that fixation. Our courts have assumed, as indeed they must, that by adopting the term, the statutes adopt the incidents of the estate as known to the developed common law.¹³⁴

*Walton v. Torrey*¹³⁵ was a suit brought by the widow and children of Jesse Hicks, who died in 1825 leaving a will directing that his land remain undivided in the use and occupation of his children until the youngest should reach twenty-one, then to be divided among them and the heirs of any who might die, subject to a life estate of the widow in the homestead and a third of the

to 8787; How. Stat. §§5517 to 5521; Comp. Laws (1915) §§11519 to 11523; Comp. Laws (1929) §§12921 to 12925; Mich. Stat. Ann. §§26.1 to 26.5; Comp. Laws (1948) §§554.1 to 554.5.

¹³³ 4 COMMENTARIES, *3.

¹³⁴ See *Mandlebaum v. McDonell*, 29 Mich. 78 at 92 (1874). The will involved in this case became operative before the effective date of the Revised Statutes of 1846, but the Revised Statutes of 1838 had adopted, at least by implication, the common-law classification of estates, including fees simple. Pp. 257-269.

¹³⁵ Harr. Ch. 259 (Mich. circa 1836).

profits of the farm. The widow and a son who was of age conveyed their interests to the defendant, and the interest of the minor children was conveyed to the defendant under license of the probate court. Chancellor Farnsworth denied an injunction against the defendant's asserting title under these conveyances, saying that the direction against division should not be construed as an attempt to inhibit any of the devisees from conveying whatever interest he possessed, and that provisions in restraint of alienation are not to be favored. The will, as so construed, did not purport to restrain the type of transfer involved, so there was no occasion for a decision as to the validity of such a restraint.

*Campau v. Chene*¹³⁶ was a suit to quiet title brought by the heirs of Jean Baptiste Campau against the devisees of Gabriel Chene. In 1800 Campau conveyed the land in question to Chene in fee simple, the deed providing that the grantee promised and obligated himself to pay £1000 and to support the grantor for life,

"And for the security of the said payment of one thousand pounds, in the manner above mentioned, and for the fulfilling of the clauses and conditions here above expressed, the said Gabriel cannot give, alienate, exchange or sell the said farm or land, . . . without the permission or assent of the said Jean Baptiste Campau, . . . till the payment in full of said one thousand pounds."

The plaintiffs contended that these provisions constituted a condition subsequent and that they were entitled to enter for breach. The court held that the provisions were not a condition but a covenant secured by a lien on the land, supporting its construction by the remark,

"If the covenant against alienation could be con-

¹³⁶ 1 Mich. 400 (1850).

sidered a condition, it would be void. For a condition annexed to a conveyance, in fee or devise, that the purchaser should not alien, is unlawful and void. 4 Kents' Com. 126." ¹³⁷

Mandlebaum v. McDonell ¹³⁸ was a suit to quiet title to land which now forms part of the site of the Federal Building in Detroit. John McDonell died in 1846 leaving a will, executed the year before, which, as construed by the court, devised a legal life estate to his widow with legal remainder in fee simple to his four sons, an adopted daughter, and a grandson,

"... upon the express condition . . . that it shall not be competent for any of my devisees hereinbefore named to either dispose of, alienate, mortgage, barter, pledge or transfer any portion of the real estate,"

until the grandson reached twenty-five years of age, or until twenty-one years from the date of the will in case of his death, and not then while the widow was living and had not remarried. During the lifetime of the widow, who had not remarried, and while the grandson was less than twenty-five years of age, the four sons, the adopted daughter, and the grandson executed conveyances of their remainder interests, under which the plaintiff claimed. The suit was brought after the death of the widow against the devisees in remainder and the administrator *cum testamento annexo* of the testator, who denied the effectiveness of the conveyances previously made.

¹³⁷ *Id.* at 414. Relief by way of foreclosure of the lien was denied on the ground of laches. The citation should be to 4 Kent, COMMENTARIES, *131. This is the passage in which Chancellor Kent questions the soundness of Justice Littleton's approval of limited restraints on alienation of a fee simple. Note 113 *supra*.

¹³⁸ 29 Mich. 78, 18 Am. Rep. 61 (1874). This case involves the effect of a restraint on alienation on a vested remainder in fee rather than on a possessory estate in fee. It is mentioned here because the ground of decision necessarily includes possessory estates as well as vested remainders.

The court, in an excellently reasoned opinion by Mr. Justice Christy which has become a classic exposition of the law of restraints on alienation, determined that the language of the will purported to restrain alienation by prohibition, that is, to make conveyances by the devisees completely ineffective, not merely to penalize them. In words broad enough to extend to all legal interests, the court denied the validity of such a prohibition, pointing out that it could have no beneficiary except the devisees themselves, and that an obligation owed only to themselves could be released by them. "But lest this may be thought too narrow a ground" the opinion proceeds to a review of the development of the English law of restraints on alienation of fees simple by way of penalty.¹³⁹ In language reminiscent of Justices Hankford and Yelverton, Mr. Justice Christy rested the invalidity of such provisions upon the twin grounds of repugnancy to the grant, i.e., that they tend to deprive the estate of an inseparable incident conferred upon it by the statute *Quia Emptores Terrarum*, and lack of a reversion or remainder to which the benefit of the restraint can be annexed. He questioned the soundness, in principle, of Littleton's Section 361, pointed out that it related to a restraint limited at all times as to alienees, and concluded,

"But however competent it may be, under the authorities, to impose upon an estate in fee, a condition against alienation to certain specified persons, it does not follow, and the authorities upon the point have no tendency to show, that a condition against selling such an estate at

¹³⁹ *Id.* at 91-107. A condition subsequent, even if valid, could not have penalized alienation under the peculiar facts of the case. The devisees were the sole heirs of the testator and so owners of any right of entry on breach of condition subsequent which he might reserve by his will.

all to any party or parties, for a long, or for any period of time, would be valid. . . .

"We are entirely satisfied there has never been a time since the statute *quia emptores* when a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, against selling for a particular period of time, was valid by the common law. And we think it would be unwise and injurious to admit into the law the principle contended for by the defendant's counsel, that such restrictions should be held valid, if imposed only for a reasonable time. It is safe to say that every estate depending upon such a question would, by the very fact of such a question existing, lose a large share of its market value. Who can say whether the time is reasonable, until the question has been settled in the court of last resort; and upon what standard of certainty can the court decide it? . . . The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void.

"Certainty in the law of real estate, as to the incidents and nature of the several species of estates and the effect of the recognized instruments and modes of transfer, is of too much importance to be sacrificed to the unskillfulness, the whims or caprices of a few peculiar individuals in isolated cases."¹⁴⁰

An earlier passage in the opinion had pointed out that a restraint on alienation, of the same scope and duration, could, perhaps, have been imposed validly by means of the trust device.¹⁴¹ The quoted language makes

¹⁴⁰ *Id.* at 97, 107. *Fuller v. McKim*, 187 Mich. 667, 154 N.W. 55 (1915), involved a restraint on alienation of a fee simple general in scope but limited in duration. A testatrix domiciled in Michigan devised in fee New York land which was subject to a twenty-year lease with a direction that the land should not be sold during the term of the existing lease. The court refused to determine the validity of this restraint, saying it was a question for the New York courts. See also *Bennett v. Chapin*, 77 Mich. 526, 43 N.W. 893 (1889).

¹⁴¹ 29 Mich. 78 at 88. See notes 548, 549. *infra*.

it clear, therefore, that the decision in *Mandelbaum v. McDonell* is not based upon any public policy favoring free alienability of land; it is grounded squarely upon the technical common-law rules of estates, rules which were made and which still operate to make interests in land certain and definite.

*Barrie v. Smith*¹⁴² did not involve a direct restraint on alienation, but it did raise a problem which has an important bearing upon the validity of penalty restraints on alienation under our statutes. The plaintiffs had conveyed land in fee simple by a deed providing that if the grantees, their heirs or assigns, should sell or keep for sale intoxicating liquor thereon or permit anyone under them to do so, title should revert to the grantors, their heirs and assigns, and they might re-enter. Defendant, a mesne purchaser from the original grantees, commenced operating a saloon on the land and plaintiffs brought ejectment to enforce their right of entry. The Michigan statutes provide,

"When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto."¹⁴³

The court held that the plaintiffs could not recover without proof that performance of the condition would be of substantial benefit to them; that the benefit of being able to assert a right of entry upon breach was

¹⁴² 47 Mich. 130, 10 N.W. 168 (1881).

¹⁴³ Rev. Stat. 1846, c. 62, §46; Comp. Laws (1857) §2630; Comp. Laws (1871) §4113; Comp. Laws (1897) §8828; How. Stat. §5562; Comp. Laws (1915) §11564; Comp. Laws (1929) §12966; Mich. Stat. Ann. §26.46; Comp. Laws (1948) §554.46.

not in itself sufficient to validate the condition. This statutory provision, so interpreted, evinces a policy analogous to the common-law rule that conditions in restraint of alienation are valid only if imposed for the benefit of a reversion or remainder in the lands involved. That the statutory rule is narrower than that of the common law, however, is shown by the decision of the court, after the plaintiffs had proved on a new trial that they owned a mill near the land in question and were interested in keeping their employees sober, that such a benefit, arising from ownership of land other than that burdened with it, was sufficient to support the condition.¹⁴⁴ The operation of the statute was narrowed further by a later decision that it is applicable only to conditions in inter vivos conveyances and does not invalidate conditions in wills.¹⁴⁵ Even as so limited, however, the statute may operate to invalidate some conditions which, because imposed upon estates less than a fee simple for the benefit of a reversion or remainder in the same land, would be valid at common law.

*Aultman, Miller & Co. v. Pettys*¹⁴⁶ was a suit to foreclose a mortgage given by Daniel Pettys, who died before the suit was started. Before executing the mortgage, Pettys had entered into an ante-nuptial contract with

¹⁴⁴ *Smith v. Barrie*, 56 Mich. 314, 22 N.W. 816 (1885). The opinion, by Cooley, C. J., contains dictum that a condition in general restraint of alienation is always void. 56 Mich. 317, 22 N.W. 818. The decision is criticized in Fratcher, "Defeasance as a Restrictive Device in Michigan," 52 MICH. L. REV. 505 at 519-520 (1954).

¹⁴⁵ *Johnson v. Warren*, 74 Mich. 491, 42 N.W. 74 (1889). Another later decision broadens the operation of the statute beyond its express words by holding that the substantial benefit must continue to the time of breach. *Abraham v. Stewart*, 83 Mich. 7, 46 N.W. 1030 (1890).

¹⁴⁶ 59 Mich. 482, 26 N.W. 680 (1886). In *Mertens v. Mertens*, 314 Mich. 651, 23 N.W. (2d) 114 (1946), the court approved a provision in a divorce decree, inserted by consent, which forbade either party to dispose of the property assigned to him without the consent of the court. Such approval seems unsound and a dangerous precedent when it is recalled that for centuries most English conveyancing was done by means of collusive or consent judgments.

the defendant in which he covenanted that, if the defendant survived him, his executors, administrators or assigns would convey the land to the defendant in fee, and both parties covenanted,

“that neither party hereto, during the lifetime of the other party, shall bargain, sell, alien, or convey, or shall incumber by mortgage, lease or otherwise, the said premises, without being joined by the other party in such bargain, sale, alienation, conveyance or incumbrance.”

The court affirmed a decree dismissing the bill in language which implies the validity of the quoted restraint on alienation. On its face this decision would appear to constitute specific enforcement of a covenant in general restraint of alienation of an estate in fee simple. Specific enforcement of such a covenant seems to have been denied even before the enactment of the statute *Quia Emptores Terrarum*.¹⁴⁷ If granted, it converts the restraint on alienation into a prohibition which forces the owner to retain the land in spite of his efforts to transfer it, thus imposing much more than a penalty for alienation. In actuality however, the ante-nuptial contract was a covenant to stand seised which operated as a conveyance of a contingent springing use to the defendant. The only thing decided was that Petty's mortgage could not bind his wife's contingent future interest. That result would follow even if there had been no attempt to impose a restraint on alienation by covenant. The validity of the covenant against alienation was not involved in the decision, and the case is not properly a precedent as to the validity or specific enforceability of such a covenant. Nevertheless, it stands in the books. a trap for the unwary.

¹⁴⁷ Note 5 *supra*.

Smith v. Smith ¹⁴⁸ was an action of ejectment brought by the executor of Joseph Smith, deceased. Joseph had executed a quit-claim deed conveying land to his son Thomas "and to his heirs for the use, benefit, and support of himself and his family, and the proper education of his children," habendum, "to have and to hold for the period of his natural life, and after his death to his children in fee-simple," Thomas covenanting,

"That he will, during the period of his natural life, keep and preserve the same free and clear from levies, liens, and incumbrances. . . .

"That he will make no conveyance of any interest therein during the life-time of any of his children, or of any of his brothers and sisters."

Thomas conveyed the land to the defendant, his wife, and died, leaving a will by which he devised all his land to the defendant. Thomas had no children. It is inferable from the opinion that he had brothers and sisters living at the time of his death. The plaintiff proceeded on the theory that the deed to Thomas conveyed only a life estate, with contingent remainder to his children. The court rejected this contention, holding that the habendum was repugnant to the grant and so void; that the deed conveyed to Thomas a fee simple, which was owned by the defendant at the time of trial. The opinion does not decide whether the defendant's title rested on her husband's deed or on his will. Neither court nor counsel raised the question of the validity of the covenants against alienation, but it may be inferred that, if the habendum was void as repugnant to the grant, the covenants were also. The action being in ejectment, however, the decision is not a precedent as to the enforceability of such covenants.

¹⁴⁸ 71 Mich. 633, 40 N.W. 21 (1888).

*Bassett v. Budlong*¹⁴⁹ was an action of ejectment brought by the heirs of Annette Budlong. In 1873 William H. Budlong had executed a quit-claim deed of the land to Annette, his wife, in the form usual to conveyance of a fee simple. Following the habendum the following language was inserted:

“Provided, always, and this indenture is made (in all respects) upon these express conditions and reservations, that is to say: *First*, it is reserved that said party of the second part shall not, at any time during the lifetime of the said party of the first part, convey to any person or persons, by deed, mortgage, or otherwise, the whole or any part of the said premises, as above described, without the written assent of the said party of the first part, or his joining in such conveyance. *Second*, it is further reserved that, in case of the decease or death of the said Annette Budlong, party of the second part, at any time before the decease or death of the said William H. Budlong, party of the first part, then, in such case, and upon such decease, the said premises, . . . shall forthwith, upon said decease, revert back unto the said William H. Budlong, of the first part, and to his assigns forever.”

Annette predeceased her husband and he died, devising the land to the defendant. The court reversed a judgment for the plaintiffs on the ground that, so far as the fee was concerned, the conveyance was intended to be contingent upon the wife's surviving, saying,

“The condition in the deed that his wife should not convey or mortgage the land without his written assent, or joining in the deed, is a clear indication that the title should not pass, because if it was the intention that it should pass, and the estate vest in his wife, the condition would be nugatory; and no force or effect be given to this part of the instrument.”¹⁵⁰

¹⁴⁹ 77 Mich. 338, 43 N.W. 984 (1889).

¹⁵⁰ *Id.* at 347.

The restraint on alienation here involved was merely a restatement of the common-law disability of a married woman to convey her land without her husband's consent or joinder.¹⁵¹ That disability was removed by the Married Women's Act of 1855,¹⁵² and the language of the court just quoted is clearly a statement that a condition purporting to restrain the exercise of the power of alienation conferred by that act is void. The opinion in *Bassett v. Budlong* has sometimes been misunderstood to assert the validity of conditions in restraint of alienation and so qualify the opinion in *Mandlebaum v. McDonell*.¹⁵³ It does not do so; indeed, it reasserts and extends the doctrine of that opinion.

*In re Estate of Schilling*¹⁵⁴ was an appeal from a probate order of distribution under a will which devised land to four children of the testatrix and the children of a fifth and provided,

"None of my said real estate shall be sold or divided between my said heirs before my youngest child is at the age of 21 years."

¹⁵¹ Restated in Rev. Stat. 1846, c. 85, §25.

¹⁵² "The real and personal estate of every female . . . may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her in the same manner and with like effect as if she were unmarried." Act 168, P. A. 1855; Comp. Laws (1857) §3292; Comp. Laws (1871) §4803; Comp. Laws (1897) §8690; How. Stat. §6295; Comp. Laws (1915) §11485; Comp. Laws (1929) §13057; Mich. Stat. Ann. §26.161; Comp. Laws (1948) §557.1. The power to devise and bequeath was conferred by the Constitutions of 1850 and 1908. CONST. 1850, art. 16, §5; CONST. 1908, art. 16, §8.

¹⁵³ Note 138 *supra*. It was held in *Watkins v. Minor*, 214 Mich. 380, 183 N.W. 186 (1921), that *Bassett v. Budlong* does not overrule or modify *Mandlebaum v. McDonell*.

¹⁵⁴ 102 Mich. 612 *sub nom.* *Moore v. Schindehette*, 61 N.W. 62 (1894). The opinion contains language (102 Mich. 617, 61 N.W. 63) which may mean that a restraint on alienation of a defeasibly vested interest is valid, even though the interest is possessory, at least so long as the defeasibility exists. The soundness of such a view is very questionable. See PROPERTY RESTATEMENT §§407, 411 (1944); note 370 *infra*.

The court held that this prohibition on alienation was void as attempting to deprive an estate in fee of one of its essential features, the right to convey, and so repugnant to the nature of the estate.

*Howard v. McCarthy*¹⁵⁵ was an action of ejectment brought by the heirs of Shepard L. Howard. In 1872 Francis A. Howard and Abbie L. Patrick conveyed lands to Shepard L. Howard by separate quit-claim deeds, each, as to grant and habendum, in the form usual to conveyance of a fee simple. The following provision was inserted between the grant and habendum of one deed,

“And it is provided that the said party of the second part shall not sell the above described lands and premises, but that after his decease the above described lands and premises shall descend to the heirs of the aforesaid Shepard L. Howard.”

The other deed contained a provision, inserted in the same position, as follows:

“And it is hereby provided and the intention of this conveyance is declared to be that the said party of the second part shall have the use and possession only of the premises above conveyed, but not the power or right to sell the same, and after his decease the said bargained land and premises shall descend to the heirs of the aforesaid Shepard L. Howard.”

In 1889 Shepard L. Howard, Francis A. Howard, and Abbie L. Patrick joined in a conveyance of the land under which the defendants claimed. A judgment for the defendants was affirmed by an equally divided court. The justices who favored reversal thought that the deeds conveyed a life estate to Shepard L. Howard with contingent remainder in fee to his heirs, and that the pro-

¹⁵⁵ 232 Mich. 175, 205 N.W. 169 (1925).

hibitions on alienation were intended only to prevent his destroying the contingent remainder, which he could not do in any event under the Michigan statutes.¹⁵⁶ The justices who favored affirmance seem to have agreed with the defendants' contentions that the 1872 deeds conveyed a fee simple to Shepard L. Howard and that the prohibitions on alienation of that estate were void. Their opinion suggests that if the 1872 deeds conveyed only a life estate, the reversion in fee was left in Francis A. Howard and Abbie L. Patrick and passed by their joinder in the 1889 deed. The latter construction seems definitely unsound. The proper construction would appear to be that contended for by the defendants, that the 1872 deeds conveyed a fee simple and that the prohibitions on alienation, although limited in duration to the life of the grantee, were void under the rule laid down in *Mandlebaum v. McDonell*.¹⁵⁷ Although the result reached is in harmony with this view, it would seem unfortunate that the court did not take this opportunity to reaffirm the doctrine of the *Mandlebaum* case in clear and unmistakable terms.

*Porter v. Barrett*¹⁵⁸ ranks with *Mandlebaum v. McDonell* as a leading case on the law of restraints on alienation. The plaintiffs sold land by executory contract to Louis Parent, who assigned his interest to Wilbratt Barrett with the consent of the vendors. The contract provided, "This land is sold upon express condition that the . . . same shall never be sold or rented to a colored person." Barrett, by separate executory con-

¹⁵⁶ Rev. Stat. 1846, c. 62, §34, c. 65, §4; Comp. Laws (1857) §§2618, 2723; Comp. Laws (1871) §§4101, 4206; How. Stat. §§5550, 5654; Comp. Laws (1897) §§8816, 8958; Comp. Laws (1915) §§11552, 11690; Comp. Laws (1929) §§12954, 13280; Mich. Stat. Ann. §§26.34, 26.523; Comp. Laws (1948) §§554.34, 565.4.

¹⁵⁷ Note 138 *supra*.

¹⁵⁸ 233 Mich. 373, 206 N.W. 532, 42 A.L.R. 1267 (1925).

tract, sold the land to Wilson Robinson, a colored person. The plaintiffs sought to assert a right of entry for breach of condition by summary proceedings for possession against Barrett and Robinson. A judgment for the defendants on procedural grounds was affirmed on the ground the condition was void as an illegal restraint on alienation of an estate in fee simple.

The opinion of the court, written by Mr. Justice Fellows, points out that the statute *Quia Emptores Terrarum* made free alienability an inseparable incident of estates in fee simple and reaffirms the view of Chancellor Kent and Mr. Justice Christiancy that Littleton's Section 361 and the English and American cases based upon it, holding valid limited restraints on alienation of a fee simple, are inconsistent in principle with the statute of Edward I. It having been ruled in *Mandlebaum v. McDonell* that a restraint general in scope but limited as to duration is void for this reason, it follows, by parity of reasoning, that a restraint limited as to alienees but unlimited in duration is equally inconsistent with the principle laid down by the statute and likewise void. After quoting Mr. Justice Christiancy's statement, "that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void,"¹⁵⁹ the opinion presses this argument to its sound and ultimate conclusion in the following language:

"Now if a restraint on alienation for a single day is bad, how can it be said that a restraint on alienation to a large class of citizens or a small one, or to even one is good? If it is not for the courts to determine what would be a reasonable time to restrain alienation, how can it be left to the courts to say whether a restraint on aliena-

¹⁵⁹ Note 140 *supra*.

tion to a class is reasonable or not? We must bear in mind that we are not dealing with a restraint on the use of the premises. Such restraints unless unreasonable have quite uniformly been upheld. Before the sale of intoxicating liquor was prohibited, this court and practically every court of last resort in the Union upheld restraints of the use of premises for its manufacture or sale. Such a restraint upon the *use* was uniformly upheld; but would a restraint on *sale* of premises to one who was engaged in the sale of intoxicating liquors elsewhere be valid? I think not. Restraints upon the erection of manufacturing plants in residential districts have uniformly been upheld, but would a restraint of sale to one engaged in the manufacturing business be valid? I think not. Restraint on the *occupancy* of premises in residential districts by colored people has been upheld by this court. *Parmalee v. Morris*, 218 Mich. 625.¹⁶⁰ Does it follow that a restraint upon the right to *sell* property to a colored man is valid? I think not. I think the holding and the reasons for the holding in *Mandlebaum v. McDonell*, *supra*, precludes us from sustaining as valid the restrictions before us.¹⁶¹

¹⁶⁰ 188 N.W. 330 (1922). Michigan adhered to the rule that a restriction against occupancy by members of a particular race is valid and specifically enforceable until overruled on constitutional grounds by the United States Supreme Court. In *Schulte v. Starks*, 238 Mich. 102, 213 N.W. 102 (1927) a provision, "that the granted premises shall not be sold, rented or leased to any person or class of persons whose ownership or occupancy would be injurious to the locality," was enforced by an injunction against occupancy by colored persons. The opinion reiterates the rule in *Porter v. Barrett* that restraint on alienation to members of a racial group is void as such. *Northwest Civic Association v. Sheldon*, 317 Mich. 416, 27 N.W. (2d) 36 (1947); *Mrsa v. Reynolds*, 317 Mich. 632, 27 N.W. (2d) 40 (1947); *Sipes v. McGhee*, 316 Mich. 614, 25 N.W. (2d) 638 (1947), reversed, *McGhee v. Sipes*, 334 U.S. 1, 68 S.Ct. 836 (1948); *Malicke v. Milan*, 320 Mich. 65, 30 N.W. (2d) 440 (1948), reversed in conformity to the decision in *McGhee v. Sipes*, 320 Mich. 77, 32 N.W. (2d) 353 (1948). *Cf.* *Kathan v. Stevenson*, 307 Mich. 485, 12 N.W. (2d) 332 (1943); *Kathan v. Williams*, 309 Mich. 219, 15 N.W. (2d) 137 (1944); *Gableman v. Dept. of Conservation*, 309 Mich. 416, 15 N.W. (2d) 689 (1944); *Saari v. Silvers*, 319 Mich. 591, 30 N.W. (2d) 286 (1948).

¹⁶¹ 233 Mich. 373 at 382-383, 206 N.W. 532. The opinion in *Porter v. Barrett* treats the condition against alienation as if it were annexed

In *Braun v. Klug*¹⁶² the defendants conveyed land to the plaintiffs in fee simple by a deed which provided, "grantees herein specifically covenant and agree that the above property will not be sold to anyone except grantors herein or their heirs, representatives or assigns. It is agreed that this covenant shall run with the land." The Court held "the condition in the deed - - is repugnant to the grant and a restraint on the inherent right of alienation and therefore void." This decision completed the development of the Michigan law of restraints on alienation by holding that a covenant in restraint of alienation is void where a condition subsequent would be invalid.

At common law a conveyance in fee simple to two or

to a conveyance of a legal possessory estate in fee simple, whereas it actually was a provision of an executory land contract. It was later decided in *Sloman v. Cutler*, 258 Mich. 372, 242 N.W. 735 (1932), notes 716, 719, *infra*, that a provision in an executory land contract against assignment without the consent of the vendor is valid, at least for some purposes. Such a provision against assignment is, however, inserted for the protection of the vendor's quasi-reversionary interest. The restraint in *Porter v. Barrett* was intended to be inserted in the deed given pursuant to the contract, for the benefit not of the vendor's interest but of other lands in the vicinity. Moreover, there was no assignment in *Porter v. Barrett*.

Act 230, P.A. 1897, Comp. Laws (1897) §§7618 to 7638; Comp. Laws (1915) §§10034 to 10056; Comp. Laws (1929) §§10304 to 10326; Mich. Stat. Ann. §§21.661 to 21.683; Comp. Laws (1948) §§455.1 to 455.24, authorizes the organization of corporations to hold property for summer resort or park purposes, permits their by-laws to prohibit transfer of stock without the consent of the board of directors, and provides that lands "assigned, allotted, or confirmed" to stockholders shall be deemed appurtenant to the stock and not transferable separately. In *In re Berry*, (D.C. Mich. 1917) 247 F. 700, Judge Tuttle expressed the view that this statute permitted such a corporation to convey land to stockholders in fee simple subject to a condition subsequent providing for forfeiture upon alienation separately from the stock or contrary to the rules of the corporation governing transfer of stock. It seems improbable that the legislature intended to authorize such a fettered fee simple. The language of the statute seems to contemplate that the corporation shall retain the fee and give stockholders only leases or licenses.

¹⁶² 335 Mich. 692, 57 N.W. (2d) 299 (1953).

more persons created a joint tenancy unless it specified that they were to hold as tenants in common.¹⁶³ If one joint tenant died, the survivor or survivors took the whole, and this right of survivorship could not be cut off by the will of the tenant so dying.¹⁶⁴ If, however, one joint tenant made an inter vivos conveyance, the joint tenancy was severed, and the transferee took an undivided interest as tenant in common which was not subject to the right of survivorship and could, therefore, be transmitted by will.¹⁶⁵ The Michigan statutes change the common-law presumption, so that a conveyance to two or more persons creates a tenancy in common "unless expressly declared to be in joint tenancy," but provide that the nature and properties of estates in joint tenancy and in common, "shall continue to be such as are now established by law, except so far as the same may be modified by the provisions" of the statutes.¹⁶⁶

*Smith v. Smith*¹⁶⁷ involved a transaction in which J. N. Smith conveyed land to a straw party who at once conveyed in fee simple to J. N. Smith and D. R. Smith as joint tenants by a deed which provided,

¹⁶³ Littleton, TENURES §277 (1481).

¹⁶⁴ *Id.*, §287. See *Butler and Baker's Case*, 3 Co. Rep. 25a, 76 Eng. Rep. 684 (1591).

¹⁶⁵ Littleton, TENURES §§292, 294.

¹⁶⁶ Rev. Stat. 1846, c. 62, §§43, 44; Comp. Laws (1857) §§2627, 2628; Comp. Laws (1871) §§4110, 4111; Comp. Laws (1897) §§8825, 8826; How. Stat. §§5559, 5560; Comp. Laws (1915) §§11561, 11562; Comp. Laws (1929) §§12963, 12964; Mich. Stat. Ann. §§26.43, 26.44; Comp. Laws (1948) §§554.43, 554.44.

¹⁶⁷ 290 Mich. 143, 287 N.W. 411, 124 A.L.R. 215 (1939). The joint tenancy in fee simple involved in this case must be distinguished from a joint tenancy for life with contingent remainder in fee to the survivor. In the latter case one tenant cannot cut off the remainder. *Schultz v. Brohl*, 116 Mich. 603, 74 N.W. 1012 (1898); *Finch v. Haynes*, 144 Mich. 352, 107 N.W. 910 (1906); *Ames v. Cheyne*, 290 Mich. 215, 287 N.W. 439 (1939); *Rowerdink v. Carothers*, 334 Mich. 454, 54 N.W. (2d) 715 (1952); *Danahey*, "The Confusing Right of Survivorship," 32 MICH. ST. BAR J. L. 14-17 (Feb. 1953).

"It is a part of the consideration for which this deed is given that neither of the parties of the second part hereto shall or can sell, deed, mortgage, or in any way incumber or dispose of his interest in said premises or any part thereof without the consent of the other party in writing."

J. N. Smith, without the consent of his cotenant, conveyed his interest to the defendant, and later died. D. R. Smith claimed title to the whole by survivorship, arguing that the prohibition on alienation was valid because annexed to and for the benefit of another interest in the same land. This argument assumed, of course, that the only basis for the common-law rule against restraints on alienation on estates in fee simple was the provision of the statute *Quia Emptores Terrarum* prohibiting reversions or remainders on such an estate. As has been seen, the rule has two bases, the other being that the statute makes alienability an inseparable incident of every estate in fee simple. The court, recognizing the latter basis of the rule, held that the prohibition on alienation "was repugnant to the grant and a restraint on the inherent right of alienation and therefore void."¹⁶⁸ Accordingly, J. N. Smith's conveyance to the defendant gave her an undivided half of the land as tenant in common in fee simple, and her estate was not cut off by the failure of J. N. Smith to survive his for-

¹⁶⁸ 290 Mich. 157, 287 N.W. 416. Accord as to result: PROPERTY RESTATEMENT §406, comment c (1944). In *Portage Grange No. 16 v. Portage Lodge No. 340*, 141 Mich. 402, 104 N.W. 667 (1905), the grange leased a lodge room to the lodge for use in common by them, the lease providing that the room should not be rented to any other lodge without the consent of both lessor and lessee. The grange rented the room to another society without the lodge's consent and sued the lodge in equity for an injunction against interference with the new tenant's use of the room. A decree for the defendant was affirmed, the court assuming without discussion that the restraint on alienation was valid. The opinion does not state whether the grange owned a fee simple or some lesser estate. See note 388 *infra*.

mer cotenant. The court was careful to point out that, inasmuch as one tenant by the entirety is disabled by law from alienating his interest without the concurrence of his cotenant,¹⁶⁹ the decision does not extend to estates held by the entirety.

As to restraints on alienation of possessory estates in fee simple by way of prohibition or penalty of forfeiture, Michigan has achieved that clarity and certainty which was the dream of the judges of the thirteenth century. All such restraints, whether general in scope and unlimited in duration or limited as to duration or alienees, are void. The law as to the validity and specific enforceability of covenants or contracts imposing like restraints has not been so fully worked out, but the decisions made point to the same result: all restraints on alienation of estates in fee simple are void. The fettered inheritances permitted by the statute *De Donis Conditionalibus* have been eliminated and the confusion in the law introduced by Section 361 of Littleton's treatise has been dispelled. To paraphrase Sir Edward Coke's nostalgic reference to the good old days before *De Donis Conditionalibus*, we have attained a state of the law in which purchasers are sure of their purchases, tenants of their leases, and creditors of their debts.¹⁷⁰

C. RESTRAINTS ON TESTATION AND DESCENT

In the process by which the mediaeval judges limited the number and fixed the incidents of the possible estates in land, they developed rules of descent for estates of inheritance.¹⁷¹ In the place of widely varying modes

¹⁶⁹ *Naylor v. Minock*, 96 Mich. 182, 55 N.W. 664 (1893); *Dickey v. Converse*, 117 Mich. 449, 76 N.W. 80 (1898). *Accord*: PROPERTY RESTATEMENT §406, comment c (1944).

¹⁷⁰ 1 INSTITUTES 19b.

¹⁷¹ 3 Holdsworth, HISTORY OF ENGLISH LAW, 3d ed., 171-185 (1923).

of inheritance prescribed by custom or the form of gifts, they strove to establish a uniform canon of descent, applicable to all estates of inheritance. The statute *De Donis Conditionalibus* partially thwarted this process of unification and simplification so far as entails were concerned, but it did not prevent the creation of a single rule of inheritance applicable to every estate in fee simple.¹⁷² This rule of inheritance became, like alienability *inter vivos*, an inseparable incident of the estate. Any attempt to deprive an estate in fee simple of heritability or to endow it with a peculiar mode of descent not following the course fixed by the general law, is repugnant to the grant and void.¹⁷³ The Michigan statutes governing descent are so worded as to suggest that they make heritability according to the statute an inseparable incident of every estate in fee simple.¹⁷⁴ Consequently, it may be predicted that the Michigan courts will hold void any provision of a conveyance or devise in fee simple

¹⁷² This statement must be qualified by an admission that a few peculiar local customs of descent, such as gavelkind and borough English, did survive. *Id.* at 256-275. Scrutton, *LAND IN FETTERS* 53-64 (1886).

¹⁷³ "The law of *England* has from the earliest times prohibited the introduction of new modes of devolution of property by operation of law. Of course a man can direct his property to go according to any series of limitations that he pleases, but he cannot create a new mode of devolution by operation of law. If there be a gift in fee, for instance, the donor cannot say that in the event of the donee dying intestate, the estate shall descend not to his eldest, but to his youngest son . . . That is, a man cannot give property absolutely, and at the same time say it shall not devolve according to law." Jessel, M. R., in *In re Wilcocks' Settlement* [1875] 1 Ch. Div. 229 at 231. *Accord:* *In re Irwin's Estate*, *Irwin v. Jacobs*, 335 Mich. 143, 55 N. W. (2d) 769 (1952). And see *Johnson v. Whiton*, 159 Mass. 424, 34 N.E. 542 (1893).

¹⁷⁴ "When any person shall die seized of any lands, tenements or hereditaments, or of any right thereto, or entitled to any interest therein in fee simple . . . , not having lawfully devised the same, they shall descend," etc. Rev. Stat. 1846, c. 67, §1; Comp. Laws (1857) §2812; Comp. Laws (1871) §4309; How. Stat. §5772a; Comp. Laws (1897) §9064; Comp. Laws (1915) §11795; Comp. Laws (1929) §13440; Mich. Stat. Ann. §27.3178 (150); Comp. Laws (1948) §702.80.

which would operate to deprive the estate of its incident of heritability or change the course of inheritance fixed by law.

The statute *Quia Emptores Terrarum* did not make transmissibility by will an incident of the estate in fee simple and, as has been seen, legal freehold estates in land were not devisable under the Plantagenets. It is probable that one of the reasons why the courts did not enforce wills of land is that they would interfere with the uniform scheme of inheritance which the courts had annexed as an inseparable incident to every estate in fee simple.

The Statute of Wills provided that any person having solely, as co-parcener or in common, an estate in fee simple,

“from the twentieth day of July in the year of our Lord God M.D.XL. shall have full and free liberty, power and authority to give, dispose, will and devise, as well by his last will and testament in writing, or otherwise by act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments, or any of them, at his free will and pleasure; any law, statute or other thing heretofore had, made or used to the contrary notwithstanding.”¹⁷⁵

The wording of the Statute of Wills indicates that it was intended to make devisability an inseparable in-

¹⁷⁵ Stat. 32 Hen. VIII, c. 1, §1 (1540), as explained by Stat. 34 & 35 Hen. VIII, c. 5 §§3, 4 (1542); see note 15 *supra*. Section 14 of the explanatory act provided that wills of land made by married women should not be good or effectual. The Michigan statute of wills is similar. Rev. Stat. 1846, c. 68, §1; Comp. Laws (1857) §2825; Comp. Laws (1871) §4322; amended Act 15, P.A. 1873; How. Stat. §5785; Comp. Laws (1897) §9262; Comp. Laws (1915) §11817; Comp. Laws (1929) §13478; Mich. Stat. Ann., §27.3178 (71); Comp. Laws (1948) §702.1. As originally enacted in 1846 the statute permitted married women to make wills only with the consent of their husbands. This disability was removed by the Constitution of 1850, and the Married Women's Act of 1855, note 152 *supra*. The earlier Michigan statutes of wills were Act Jan. 31, 1809, 2 L. TERR. MICH. 13; Rev. Stat. 1838, p. 270.

cident of every estate in fee simple, just as the statute *Quia Emptores Terrarum* made alienability inter vivos an inseparable incident of every such estate, and it has been so interpreted. A restraint on transmission of an estate in fee simple by will is void if a like restraint on inter vivos alienation would be.

If land is conveyed or devised in fee simple, a gift over upon the death of the first taker if he fails to dispose of the land by will is clearly void.¹⁷⁶ It restrains alienation by deed during the life of the first taker and deprives the estate of the essential incident of heritability. If Andrew Baker devises land to John Stiles, his heirs and assigns, "but any part undisposed of by the will of John shall pass, at John's death to Lucy Baker, her heirs and assigns," the executory limitation to Lucy is void. If valid, it would prevent John from conveying in fee by deed and would prevent his heirs from taking if he died intestate. Conversely, if land is conveyed or devised in fee simple, a gift over upon the death of the first taker if he fails to dispose of the land by deed is void at common law.¹⁷⁷ It deprives the estate of the essential incidents of heritability and of devisability. If John Stiles devises land to his wife Lucy, her heirs and assigns, "but what remains undisposed of at her death shall pass to our children," the executory limitation to the children is void. Moreover, if land is conveyed or devised in fee simple, a gift over upon the death of the first taker if he fails to dispose of the land by deed or

¹⁷⁶ Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.37 (1952).

¹⁷⁷ Gray, RESTRAINTS ON ALIENATION, 2d ed., 43-48 (1895); Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §§26.41 to 26.44 (1952); Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 YALE L.J. 961, 1186 at 1198-1199 (1935). Accord: PROPERTY RESTATEMENT §406, comment f.

will is also void at common law.¹⁷⁸ It attempts to deprive the estate of the essential incident of heritability.

Although, as has been seen, the true reason why an executory interest cutting off a fee simple on failure of its holder to alienate is invalid is that it is a restraint on alienation by descent, devise or both, the courts have commonly relied upon the very different reason that, as such an executory interest would be destructible by the first taker, it would violate the rule that executory interests are indestructible. New York and Michigan have statutes authorizing the creation of destructible executory interests.¹⁷⁹ There is some authority in New York for the proposition that these statutory provisions validate a gift over on failure of the first taker of an estate in fee simple to alienate by deed.¹⁸⁰ There is no Michigan authority for this proposition and the Michigan cases about to be discussed make it clear that these statutes have not changed the common law on this point here.

*Jones v. Jones*¹⁸¹ was a suit to construe a will which devised the testator's estate to his widow,

"to have, hold, use, and enjoy the same, as she may

¹⁷⁸ The cases are collected in Gray, *RESTRAINTS ON ALIENATION*, 2d ed., 48-69 (1895), Schnebly, "Restraints Upon the Alienation of Property," 6 *AMERICAN LAW OF PROPERTY*, §26.42 (1952) and Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 *YALE L.J.* 961, 1186 at 1198-1207 (1935). Professors Gray and Schnebly question the soundness of the rule because it is not explicable by their theory that the law of restraints on alienation is based wholly upon a public policy favoring free alienability of land. Accord with the rule: *PROPERTY RESTATEMENT* §27, comment *f* (1936), §406, comment *g* (1944). Annotation 17 *A.L.R.* (2d) 7-227 (1951).

¹⁷⁹ *N.Y. Real Property Law*, §57; *Rev. Stat.* 1846, c. 62, §33; *Comp. Laws* (1857) §2617; *Comp. Laws* (1871) §4100; *Comp. Laws* (1897) §8815; *How. Stat.*, §5549; *Comp. Laws* (1915) §11551; *Comp. Laws* (1929) §12953; *Mich. Stat. Ann.*, §26.33; *Comp. Laws* (1948) §554.33.

¹⁸⁰ *Vincent v. Rix*, 248 *N.Y.* 76, 161 *N.E.* 425 (1928). *Contra: Tillman v. Ogren*, 227 *N.Y.* 495, 125 *N.E.* 821 (1920).

¹⁸¹ 25 *Mich.* 401 (1872).

see fit, and in all respects the same as though it was hers absolutely and without any limitation or reversion, for and during her natural life.

"And after the death of my said wife, it is my will, that my estate . . . that shall remain, should be distributed in manner following, to wit: (three quarters to named persons and a society); and the remaining one-fourth of said estate I desire that my said wife shall dispose of as she sees fit; the division, however, not to take place until after her death.

"If my said wife shall desire to make sale of any of my said real estate, in her use and enjoyment of it during her life, it is my will and desire that she have, and I hereby give her, full power and authority to make such sale, and to give all necessary deeds of conveyance thereof, and to receive the consideration therefor, to be used as aforesaid by her during her life."

The court held that the intention expressed in the will was to give the widow the entire estate in fee simple absolute and that the second paragraph quoted above was merely a precatory expression of what the testator hoped she would do with three quarters of the property when she was through with it. The court said, however, that if the second quoted paragraph "should be considered as covering a gift of what should remain, it would be void, as inconsistent with the absolute estate, or *jus disponendi*, previously given." If, as the court thought, the testator intended to give his widow a fee simple, this dictum is correct, for the second quoted paragraph of the will would operate to deprive the estate of its inseparable incidents of heritability and devisability and so be a void restraint on alienation. That is, a gift over on failure of the first taker to alienate inter vivos is repugnant to a grant or devise in fee simple.

The dictum in *Jones v. Jones* has been misunderstood and has served as the foundation for a line of cases hold-

ing or assuming that there cannot be a remainder following a life estate if the life tenant is given unlimited power of inter vivos disposition of the fee.¹⁸² The theory of these cases, based on authority in other jurisdictions, is that a gift of a life estate plus an unlimited power of disposition inter vivos, as a matter of law, and without regard to the intention expressed, operates to convey a common-law estate in fee simple. If this premise were sound in Michigan, the conclusion drawn by the cases would be correct, i.e., that a gift over on failure of a tenant in fee simple to alienate inter vivos is a void restraint on heritability and devisability. In Michigan,

¹⁸² *Glover v. Reid*, 80 Mich. 228, 45 N.W. 91 (1890) (personalty; power held limited and so assumed rule of *Jones v. Jones* inapplicable); *Jones v. Deming*, 91 Mich. 481, 51 N.W. 1119 (1892) (realty; same as preceding); *Gadd v. Stoner*, 113 Mich. 689, 71 N.W. 1111 (1897) (realty; same as preceding); *In re Mallory's Estate*, 127 Mich. 119, 86 N.W. 541, 89 N.W. 348 (1901) (same as preceding); *Dills v. La Tour*, 136 Mich. 243, 98 N.W. 1004 (1904) (realty; gift over held void on the basis of the assumed rule of *Jones v. Jones*); *Moran v. Moran*, 143 Mich. 322, 106 N.W. 206 (1906) (same as preceding); *Killefer v. Bassett*, 146 Mich. 1, 109 N.W. 21 (1906) (same as preceding); *Turnbull v. Leavitt*, 158 Mich. 545, 123 N.W. 43 (1909); *Farlin v. Sanborn*, 161 Mich. 615, 126 N.W. 634 (1910) (same as *Jones v. Deming*); *Bateman v. Case*, 170 Mich. 617, 136 N.W. 590 (1912) (same as preceding); *White v. Grand Rapids & Indiana Ry. Co.*, 190 Mich. 1, 155 N.W. 719 (1915) (same as *Dills v. La Tour*); *Laberteaux v. Gale*, 196 Mich. 150, 162 N.W. 968 (1917) (same as *Jones v. Deming*); *Gibson v. Gibson*, 213 Mich. 31, 181 N.W. 41 (1921) (same as *Dills v. La Tour*). In *Quarton v. Barton*, 249 Mich. 474, 229 N.W. 465 (1930) the court refused to apply the assumed rule in *Jones v. Jones* to facts similar to those in *Dills v. La Tour* and *Gibson v. Gibson*. Although it was suggested in 274 Mich. xxxv (1936) that *Quarton v. Barton* overruled the doctrine, the opinion in that case does not do so in terms. Cf. *In re Moor's Estate*, 163 Mich. 353, 128 N.W. 198 (1910); *Chamberlain v. Husel*, 178 Mich. 1, 144 N.W. 549 (1913); *In re East's Estate*, 325 Mich. 352, 38 N.W. (2d) 889 (1949); *Thompson v. Thompson*, 330 Mich. 1, 46 N.W. (2d) 437 (1951); *Hollway v. Atherton*, 205 Mich. 129, 171 N.W. 413 (1919); *Grover v. Wood*, 337 Mich. 467, 60 N.W. (2d) 316 (1953).

In New York [*Leggett v. Firth*, 132 N.Y. 7, 29 N.E. 950 (1892)] and, by the great weight of authority, at common law, a remainder of an estate for life is valid even if the life tenant has unlimited power to dispose of the fee. Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.47b (1952).

however, the premise is not sound because our statutes provide that when an unlimited power of disposition of the fee inter vivos is given to a life tenant,

“such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed,” ¹⁸³

This statutory fee is not a common-law fee simple, and the gift over on failure of the life tenant to alienate inter vivos is not repugnant to the statutory fee because the statute says that it is not. This line of cases is, then, a correct exposition of the law of restraints on alienation of common-law estates in fee simple, but it reaches a result contrary to the language of our statutes.

Robinson v. Finch ¹⁸⁴ was a suit to construe a will. One clause devised the residue to Thomas Weldon; the next provided that if Thomas should die leaving no wife and children, the property not used by him or for his education or benefit should pass to named persons. Thomas died without wife or children. The court held that the gift over was valid. The decision is probably sound and in accordance with the general rule in like cases, inasmuch as the defeasibility of Thomas's estate was not conditioned on his failure to alienate but on his death without wife or children, a common contingency upon which to base an executory limitation. The mere fact that he had a limited power of disposition free of the defeas-

¹⁸³ Rev. Stat. 1846, c. 64, §§9, 13; Comp. Laws (1857) §§2666, 2670; Comp. Laws (1871) §§4149, 4153; Comp. Laws (1897) §§8864, 8868; How. Stat. §§5598, 5602; Comp. Laws (1915) §§11600, 11604; Comp. Laws (1929) §§13003, 13007; Mich. Stat. Ann. §§26.99, 26.103; Comp. Laws (1948) §§556.9, 556.13.

¹⁸⁴ 116 Mich. 180, 74 N.W. 472 (1898).

ibility of his estate in general should not invalidate the executory limitation.¹⁸⁵

There is dictum in *Mandlebaum v. McDonell*¹⁸⁶ that "a man cannot by contract render his will irrevocable during his life, for it is of the very essence of a will to be revocable until death." Strictly speaking, this statement is correct. Notwithstanding a contract against revocation, a testator can revoke his will and the revoked will is no longer eligible for probate.¹⁸⁷ Nevertheless, the English courts have long recognized the validity of a contract to transfer property by will. Such a contract could be enforced by an action at law for breach against the executor of the deceased promisor,¹⁸⁸ or by a suit in equity to compel the heir or devisee of the promisor to hold the property upon constructive trust for the promisee or beneficiary of the promise.¹⁸⁹ The Michigan decisions are to the same effect. If the owner of land, for an adequate consideration, contracts to devise it to the other party to the contract and does not do so, the promisee can compel the transferee, devisee, or heir of the promisor to convey the land to him.¹⁹⁰ And a con-

¹⁸⁵ See Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 YALE L.J. 961, 1186 (1935); Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.47a (1952). But see §26.44.

¹⁸⁶ 29 Mich. 78 at 91 (1874). See *Mertens v. Mertens*, 314 Mich. 651 at 658, 23 N.W. (2d) 114 (1946).

¹⁸⁷ *Hobson v. Blackburn*, 1 Add. 274, 162 Eng. Rep. 96 (1822); *Keasey v. Engles*, 259 Mich. 178, 242 N.W. 878 (1932). See *Eicholtz v. Grunewald*, 313 Mich. 666 at 675-676, 21 N.W. (2d) 914 (1946).

¹⁸⁸ *Silvester's Case*, Poph. 148, 79 Eng. Rep. 1248 (1619).

¹⁸⁹ *Goilmere v. Battison*, 1 Vern. 48, 23 Eng. Rep. 301 (1682); *Fortescue v. Hennah*, 19 Ves. Jr. 67, 34 Eng. Rep. 443 (1812); Cf. *Lord Walpole v. Earl of Orford*, 3 Ves. Jr. 402, 30 Eng. Rep. 1076 (1797); *Cochran v. Graham*, 19 Ves. Jr. 63, 34 Eng. Rep. 442 (1811).

¹⁹⁰ *Bird v. Pope*, 73 Mich. 483, 41 N.W. 514 (1889); *Jolls v. Burgess*, 252 Mich. 437, 233 N.W. 372 (1930). See *Faxton v. Faxton*, 28 Mich. 159 (1873); *Sword v. Keith*, 31 Mich. 247 (1875); *De Moss v. Robinson*, 46 Mich. 62, 8 N.W. 712 (1881). There are numerous later cases which assume the validity of contracts to make a will. E.g., *Kelley v.*

tract to transmit property by will is enforceable by a beneficiary who is not a party to the contract.¹⁹¹ Contracts of the latter type usually are in the form of agreements not to revoke a joint or mutual will. As has been seen, such a contract does not prevent the revocation of the will, but it does subject the devisee under a subsequent will to a constructive trust for the benefit of the devisee under the joint or mutual will.¹⁹² Moreover, a contract by an owner of land not to convey or devise it and to allow it to descend to his heirs is specifically enforceable by the heirs.¹⁹³

In form, a contract to make a will, not to revoke a will, or not to make a will is a serious restraint on alienation of an estate in fee simple, particularly when it is construed to restrain inter vivos alienation by the promisor.¹⁹⁴ Upon analysis, however, it is seen that such

Dodge, 334 Mich. 499, 54 N.W. (2d) 730 (1952); *Coull v. Piatt*, 337 Mich. 334, 60 N.W. (2d) 157 (1953). In *Mertens v. Mertens*, 314 Mich. 651, 23 N.W. (2d) 114 (1946), a provision in a divorce decree requiring the husband to make a will and leave it unchanged was held improper in the absence of a voluntary contract to do so. Such a provision is proper, however, if it confirms a voluntary property settlement. *Kull v. Losch*, 328 Mich. 519, 44 N.W. (2d) 169 (1950).

¹⁹¹ *Carmichael v. Carmichael*, 72 Mich. 76, 40 N.W. 173 (1888); *Smith v. Thompson*, 250 Mich. 302, 230 N.W. 156 (1930); *Getchell v. Tinker*, 291 Mich. 267, 289 N.W. 156 (1939). See *Elmer v. Elmer*, 271 Mich. 517, 260 N.W. 759 (1935). In such cases however, the parties to the contract may rescind or modify it without the consent of the beneficiary. *Sage v. Sage*, 230 Mich. 477, 203 N.W. 90 (1925); *Phelps v. Pipher*, 320 Mich. 663, 31 N.W. (2d) 836 (1948); *Rose v. Southern Michigan National Bank*, 328 Mich. 639, 44 N.W. (2d) 192 (1950).

¹⁹² *Keasey v. Engles*, 259 Mich. 178, 242 N.W. 878 (1932). See *Eicholtz v. Grunewald*, 313 Mich. 666 at 675-676, 21 N.W. (2d) 914 (1946).

¹⁹³ *Ruch v. Ruch*, 159 Mich. 231, 124 N.W. 52 (1909).

¹⁹⁴ In *Fortescue v. Hennah*, note 189 *supra*, the contract was construed as not inhibiting inter vivos alienation. In *Carmichael v. Carmichael*, note 191 *supra*, *Bird v. Pope*, note 190 *supra*, *Ruch v. Ruch*, note 193 *supra*, *Jolls v. Burgess*, note 190 *supra*, and *Getchell v. Tinker*, note 191 *supra*, the contracts were construed to restrain inter vivos transfer and enforced against the transferees. See *Klever v. Klever*, 333 Mich. 179, 52 N.W. (2d) 653 (1952); *Trisch v. Fairman*, 334 Mich.

a contract is not intended to and does not operate to restrain alienation by an owner in fee simple. It is merely an executory land contract binding the promisor to convey in the future by a particular mode of conveyance. An executory land contract operates to create an equitable estate, usually contingent or defeasible, in the purchaser. This type of contract creates an equitable future interest in the beneficiary. The promisor is not restrained from alienating his retained legal interest, but any transfer which he makes is subject to the equitable future interest of the contract beneficiary. The decisions relative to these contracts, therefore, do not qualify the general rule that restraints on the heritability or devisibility of estates in fee simple are void.

D. RESTRAINTS ON PARTITION AND DIVISION

At common law, joint tenants and tenants in common, because each had full power of inter vivos alienation of his interest, could partition their land by voluntary action. One joint tenant or tenant in common could not, however, compel partition.¹⁹⁵ A statute of 1539 empowered such a tenant to do so, by action at law or suit in equity, in language which would seem to be designed to annex the power to such estates as an inseparable incident.¹⁹⁶ Nevertheless, the English courts appear to be willing to enforce at least some restraints on compulsory partition,¹⁹⁷ and the American courts are in conflict as

432, 54 N.W. (2d) 621 (1952). If the contract is construed as not inhibiting inter vivos alienation the promisor is left with a life estate and an unlimited power of disposition inter vivos, which raises the problem involved in the cases cited in note 182 *supra*.

¹⁹⁵ Littleton, TENURES §§290, 318 (1481). A parcener could compel partition. *Id.*, §241.

¹⁹⁶ 31 Hen. VIII, c. 1, §2 (1539).

¹⁹⁷ *Peck v. Cardwell*, 2 Beav. 137, 48 Eng. Rep. 1131 (1839). *Cf. Abel v. Heathcote*, 2 Ves. Jr. 98, 30 Eng. Rep. 542 (1793).

to the validity of such restraints.¹⁹⁸ The *Restatement of Property* takes the position that a restraint on voluntary partition is no more valid than any other restraint on alienation of a fee simple, but that a restraint upon the power to compel partition is valid if limited in duration to a reasonable time.¹⁹⁹ "Reasonable time" is defined as lives in being or twenty-one years.²⁰⁰ As Professor Gray has pointed out,²⁰¹ a restraint upon compulsory partition is not, strictly speaking, a restraint on alienation because it does not deprive the owner of an interest of the power to transfer what he has or penalize him for doing so. Yet it is a severe indirect restraint on alienation and, if the statutes of partition are intended to make the power to compel partition an inseparable incident of every joint tenancy and tenancy in common, enforcement of restraints on that power is inconsistent in principle with the treatment of restraints on alienation.

The Michigan statutes provide, "All persons holding lands as joint tenants or tenants in common, may have partition thereof," ²⁰² The decision in *Smith v. Smith* ²⁰³ that a restraint on the power of a joint tenant

¹⁹⁸ The cases are collected in Gray, *RESTRAINTS ON ALIENATION*, 2d ed., 24-25 (1895); Schnebly, "Restraints Upon the Alienation of Property," 6 *AMERICAN LAW OF PROPERTY*, §26.74 (1952); Manning, "The Development of Restraints on Alienation Since Gray," 48 *HARV. L. REV.* 373 at 393-394 (1935); Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 *YALE L.J.* 961, 1186, 1380 at 1397-1403 (1935). Restraints on compulsory partition have usually been held valid if limited in duration to the period of the common-law Rule Against Perpetuities.

¹⁹⁹ Sections 173 (1936), 412 (1944).

²⁰⁰ Section 173, comment *c* (1936).

²⁰¹ Gray, *RESTRAINTS ON ALIENATION*, 2d ed., 25 (1895).

²⁰² Rev. Stat. 1846, c. 109, §1; Comp. Laws (1857) §4616; Comp. Laws (1871) §6266; How. Stat. §7850; Comp. Laws (1897) §11013; Comp. Laws (1915) §13258; Comp. Laws (1929) §14995; Mich. Stat. Ann. §27.2012; Comp. Laws (1948) §631.1. The earlier statutes were Act April 24, 1820, 1 *L. TERR. MICH.* 633, Act April 12, 1827, 2 *id.*, 388; Rev. Stat. 1838, p. 481.

²⁰³ 290 Mich. 143, 287 N.W. 411 (1939), note 167 *supra*.

in fee simple to sever the tenancy by conveying his interest is void would seem to indicate that no restraint could be imposed in this state upon voluntary partition, by joint tenants or tenants in common. If all of the cotenants convey their interests in the entire tract to a third person who conveys separate parts of the tract in severalty to each of them, partition would be accomplished even if there could be a valid restraint on their releasing directly to each other. The Michigan law as to restraints on the statutory power of one joint tenant or tenant in common to compel his cotenants to submit to partition against their wishes is not so clear.

In *Walton v. Torrey*²⁰⁴ a provision in a will devising land to children that it should "remain undivided in the use, occupation and possession of all my children now living, until the youngest attains the age of 21 years" was held not to prevent all of the devisees from conveying to a third party. There was no occasion for determining the validity of the provision as a restraint on partition, voluntary or compulsory, but the decision demonstrates the ineffectiveness, if not the invalidity, of a restraint on voluntary partition.

*Avery v. Payne*²⁰⁵ was a suit for partition under the statute. The defendant had conveyed an undivided half of a large tract of land to the plaintiff, the sole consideration being a mortgage on the interest conveyed securing a bond for payment to the defendant of \$25,000 from the proceeds of sales of the land and a collateral contract by which the plaintiff agreed to manage the subdivision and sale of the land. The suit for partition was commenced some eight years after the execution of this conveyance and while much of the tract remained unsold.

²⁰⁴ Harr. Ch. 259 (Mich. circa 1836), note 135 *supra*.

²⁰⁵ 12 Mich. 540 (1864).

The court denied partition on the ground that it would be inconsistent with the contract, saying,

"We think the statute can only be considered imperative in its application to ordinary joint tenancies or tenancies in common, where the right of partition is left to result as an ordinary legal incident of such tenancy; and that it was never intended to interfere with contracts between such tenants modifying or limiting this otherwise incidental right; nor to render it incompetent for parties to make such contracts, either at the time of the creation of the tenancy or afterwards." ²⁰⁶

Eberts v. Fisher ²⁰⁷ was a suit to terminate a lease and compel partition brought by four of eleven devisees of the reversion against the lessees, who had acquired the interests of the other seven devisees of the reversion. The lease, made in 1860 by the deviser, who died in 1876, provided that it should run until 1880 and should be extended automatically to 1890 unless the reversioners elected in 1880 to pay the lessees for improvements made by them. The reversioners did not so elect in 1880 but instead brought this suit, contending that the lease was forfeited by breach of several conditions. The court held that there had been no breach of the conditions of the lease and denied partition, saying,

"As a general rule it is a matter of right for a tenant in common of lands to have partition. But this rule is not of universal application. A party may enter into such agreements with his co-tenant as to estop him from enforcing the right of partition. This principle was recognized and applied in *Avery v. Paine*, 12 Mich. 540; and when in this case, instead of terminating the lease at the

²⁰⁶ *Id.* at 548-549. The opinion was written by Justice Christiancy ten years before he wrote his great opinion in *Mandlebaum v. McDonell*, note 138 *supra*. See *Swan v. Ispas*, 325 Mich. 39 at 44-45, 37 N.W. (2d) 704 (1949).

²⁰⁷ 54 Mich. 294, 20 N.W. 80 (1884).

end of twenty years, the complainants and defendants, by mutual consent, obtained an appraisal of the premises, it was in effect an agreement that the premises should be held by the lessees ten years longer under the terms of the lease; and in view of the relation of the parties to the fee and reversion, it was as plainly implied that such relations should not be interfered with by partition, without mutual consent, so long as the terms of the lease were kept and performed by the lessees. Counsel for complainant (sic) admit that unless the lease has been terminated by breach of the conditions thereof, a partition is neither desirable nor asked for." ²⁰⁸

Eberts v. Fisher is commonly cited in support of the proposition that a restraint on compulsory partition of an estate in fee simple is valid if limited in duration to a reasonable period. In view of the facts that the plaintiffs did not ask for partition so long as the lease remained in force and the lease was held to be in force, the language of the opinion relative to the validity of restraints on partition is only dictum.

In re Estate of Schilling ²⁰⁹ was an appeal from a probate order of distribution under a will which devised land to four children of the testatrix and the children of Caroline Moore, a fifth child,

"Provided always, that none of my said real estate shall be sold or divided between my said heirs before my youngest child is at the age of twenty-one (21) years."

²⁰⁸ *Id.* at 299.

²⁰⁹ 102 Mich. 612, 61 N.W. 62 (1894), note 154 *supra*. The partition in this case was ordered by the probate court under Rev. Stat. 1846, c. 74, §5 [Comp. Laws (1857) §2995; Comp. Laws (1871) §4499; How. Stat. §5967], relating to partition incident to administration among heirs and devisees, rather than under the general statute authorizing suits for partition in the circuit court, note 202 *supra*. There is no difference between the statutes which would affect the problem under consideration. The current statute governing partition by probate courts is the Probate Code (Act 288, P.A. 1939), c. 2, §98; Mich. Stat. Ann. §27.3178 (168); Comp. Laws (1948) §702.98.

The order appealed from, entered when the youngest child of the testatrix was some seventeen years of age, directed an immediate partition of the land between the devisees in severalty. The appellants contended that the division should not be made until this child reached twenty-one. The court affirmed the order of distribution, holding that the quoted provision of the will was "void as repugnant to the nature of the estate" so far as vested interests were concerned. As all interests under the will vested upon the death of Caroline Moore, which occurred before the order complained of was entered, the restraint was wholly ineffective when that order was made.

It would be unwise to assert that the four cases discussed make the Michigan law as to restraints on partition definite and certain. The decisions in *Walton v. Torrey* and *In re Estate of Schilling* indicate that a prohibition on partition in the instrument creating the cotenancy is void as repugnant to the estate created. As *In re Estate of Schilling* relies upon *Mandlebaum v. McDonell*,²¹⁰ it is probable that a provision in the instrument creating a joint tenancy or tenancy in common imposing a forfeiture or other penalty on partition would likewise be void as repugnant to the grant. *Avery v. Payne* and *Eberts v. Fisher* indicate, on the other hand, that a contract against partition made by joint tenants or tenants in common with each other will be enforced specifically by denial of compulsory partition, thus making such a contract effective as a prohibition on partition. There is nothing in the last two cases to indicate whether Michigan will follow the qualification suggested by the *Restatement* that such restraints on partition must be limited in duration to a reasonable period.

²¹⁰ 29 Mich. 78 (1874), note 138 *supra*.

When knighthood was in flower, a feudal overlord was more likely to object to his tenant's alienating part of his land than to a transfer of all of it, since division of the holding compelled the overlord to look to several tenants instead of one for performance of the services due from the land. The statute *Quia Emptores Terrarum* empowered every tenant in fee simple "to sell at his own pleasure his lands and tenements, or part of them" and devoted one of its three chapters exclusively to regulating the division of services necessarily incident to alienation of part of an estate.²¹¹ It seems perfectly clear that a provision in a conveyance of an estate in fee simple that the tract must be kept intact and alienated, if at all, only as a whole, should be considered void as attempting to deprive the estate of the inseparable incident of alienability in part conferred on it by the statute.

*Utujian v. Boldt*²¹² was a suit to restrain resubdivision. The defendants had sold the plaintiff 2.8 acres according to an unrecorded plat of a larger tract showing no lot smaller than an acre. Later the defendants recorded a plat showing much smaller lots. The plaintiff sought an injunction prohibiting the defendants from selling

²¹¹ 18 Edw. I, stat. 1 (1290). The Plat Act of 1929 [P.A. 172, as amended; Comp. Laws (1929) §§13198 to 13276; Mich. Stat. Ann. §§26.431 to 26.509; Comp. Laws (1948) §§560.1 to 560.79] prohibits, by penalty of \$50 per lot sold, the partitioning or dividing of a lot, tract, or parcel of land into ten or more lots for the purpose of sale or occupancy for residential purposes, other than by recorded plat, and authorizes a purchaser of a lot described by reference to an unrecorded plat to rescind his purchase. The act requires approval of plats prior to recording by various public authorities and permits townships to regulate the width of lots, provided that residence lots may not be required to be more than forty feet wide. The act has no application to subdivision of agricultural land into lots of ten or more acres for agricultural use. Nothing in the act appears to authorize private restrictions on resubdivision which are more onerous than those imposed by it.

²¹² 242 Mich. 331, 218 N.W. 692 (1928).

lots of less than an acre in size. A decree for the plaintiff was reversed on the ground that the plaintiff had not established the existence of a general scheme or plan restricting the tract to large lots. The opinion suggests that such a restriction would be valid.

*Bang v. Forman*²¹³ was a similar suit. The plaintiffs and defendants had purchased lots according to a recorded plat which showed twenty-seven lots, each fifty feet wide and extending some five hundred feet from a beach to a road. The conveyance of each lot restricted its use to dwelling purposes and conferred on the owner a right to use the beach in common with other lot owners. The defendants resubdivided three of these large lots into twenty-six small lots and sold some of the small lots on executory contract to purchasers who erected cottages. A decree for the plaintiffs was affirmed in an opinion which stresses the fact that the occupation of the three original lots by twenty-six families would overburden the easement of use of the beach.

*Wilcox v. Mueller*²¹⁴ was also a suit to restrain resubdivision. A subdivision containing lots of 3.7 acres each was restricted throughout to a single dwelling on each lot, except that certain lots might be subdivided so as to build not more than one house on each 175 feet of frontage. The original subdivider and all the then lot owners signed an agreement permitting the owners of four lots to subdivide these four into 75 foot lots, with restrictions to one house on a lot. The owners of these four lots did not take advantage of this agreement but instead conveyed two of the lots to the original subdivider and two to the defendants, who sought to resub-

²¹³ 244 Mich. 571, 222 N.W. 96 (1928). Cf. *Henkle v. Goldenson*, 263 Mich. 140, 248 N.W. 574 (1933).

²¹⁴ 250 Mich. 167, 229 N.W. 600 (1930).

divide these two into 90 and 150 foot lots. A decree for the defendants was reversed, the court holding that the agreement permitted resubdivision only of the whole four lots to which it related, not of the two alone.

In the decision of these three cases, the court failed to take account of the distinction between use restrictions and restraints on alienation set out in *Porter v. Barrett*.²¹⁵ A restriction against occupancy of a given tract by more than one family or against erection of more than one house on a parcel of land is valid under our law, though such restraints may tend to promote snobishness, foster the growth of a landed aristocracy, and deter municipal development. A restraint on alienation of part of a tract conveyed in fee simple is void under the statute *Quia Emptores Terrarum*.²¹⁶ That the use restrictions may have the same practical result as the restraint on alienation is no answer to the mandate of the statute, as the opinion in *Porter v. Barrett* clearly points out. Insofar as *Utujian v. Boldt*, *Bang v. Forman*, and *Wilcox v. Mueller* hold that an owner in fee simple can be restrained from alienating part of his land, they are wrong in principle and ought to be overruled.

E. ILLUSORY RESTRAINTS

As has been seen, even after it was settled that every restraint on barring an entail by common recovery or statutory fine was void, it was possible to impose a valid penalty restraint on forms of alienation by a tenant in tail which had a purely tortious operation, putting the heirs in tail or the remainderman to the trouble of more difficult legal procedures to assert their rights.²¹⁷ Like-

²¹⁵ 233 Mich. 373, 206 N.W. 532 (1925), note 158 *supra*.

²¹⁶ Re Lunham's Estate, I.R. 5 Eq. 170 (1871).

²¹⁷ Coke, INSTITUTES 223b-224a and Butler's note No. 132 to 13th ed. (1787); note 80 *supra*.

wise, a penalty restraint on wrongful alienation of a fee simple, such as a tortious feoffment by a husband seised in right of his wife, was valid at common law.²¹⁸ In both cases what was restrained was not really alienation but wrongful attempts to alienate that which the alienor had no power to alienate, attempts which could operate only to confuse and encumber the title. The same principle is observable in the decisions relative to contracts to devise by will, to leave a will unaltered, or to refrain from making a will. In form such contracts are restraints on alienation; in substance they are merely awkward methods of conveying future interests and so not objectionable as restraints on alienation.

At common law, when property was conveyed to a public or charitable corporation with a restriction, express or implied, to use for the corporate purposes or some of them, the corporation was incapable of alienating the property.²¹⁹ Michigan unquestionably recognizes the validity of such restricted gifts.²²⁰ Such a conveyance does not, strictly speaking, create a trust, but

²¹⁸ Anonymous, Y.B. 10 Hen. VII, Mich., pl. 28 (1494); note 108 *supra*.

²¹⁹ In the cases of ecclesiastical corporations, colleges, and hospitals, this inalienability was declared by statute, except that leases for three lives or twenty-one years reserving the customary rent could be made. 1 Eliz., c. 19 (1558); 13 Eliz., cc. 10, 20 (1571); 14 Eliz., c. 11 (1572); 18 Eliz., c. 11 (1575); 1 Jac. I, c. 3 (1603). As to other public and charitable corporations, it was declared by judicial decision. *Attorney-General v. Corporation of Plymouth*, 9 Beav. 67, 50 Eng. Rep. 268 (1845). See *Mayor and Commonalty of Colchester v. Lowten*, 1 V. & B. 226, 35 Eng. Rep. 89 (1813); *Attorney-General v. Warren*, 2 Swans. 291, 36 Eng. Rep. 627 (1818); *Attorney-General v. Pembroke Hall*, 2 Sim. & St. 441, 57 Eng. Rep. 415 (1825); Bordwell, "Alienability and Perpetuities," 24 IOWA L. REV. 1 at 12, 15 (1938).

²²⁰ *Maynard v. Woodward*, 36 Mich. 423 (1877); *Hathaway v. Village of New Baltimore*, 48 Mich. 251, 12 N.W. 186 (1882); *Penny v. Croul*, 76 Mich. 471, 43 N.W. 649 (1889); *FitzGerald v. City of Big Rapids*, 123 Mich. 281, 82 N.W. 56 (1900); *German Corp. v. Negaunce German Aid Soc.*, 172 Mich. 650, 138 N.W. 343 (1912); *Hosmer v. City of Detroit*, 175 Mich. 267, 141 N.W. 657 (1913); *Greenman v. Phillips*, 241 Mich. 464, 217 N.W. 1 (1928); *Michigan Congregational Conference v. United Church of Stanton*, 330 Mich. 561, 48 N.W. (2d)

the result is much like a perpetual charitable trust.²²¹ As any alienation of such property is wrongful, it would seem that a provision in the conveyance to the corporation for forfeiture of the property on an attempt to alienate should be valid.²²² In *County of Oakland v. Mack*²²³ the Michigan Supreme Court treated as valid a provision in a conveyance of land to a county for the purpose of erecting a court house, that,

"if the above granted and described lots of land or any or either of them be at any time used, appropriated or sold otherwise than is herein expressed, limited and declared, then the same shall revert back to the said (grantor)."

So far as conditions subsequent, that is, provisions for forfeiture to the creator of the estate or his heirs, are concerned, the law has been modified by a statute providing that,

"Whenever any lands shall heretofore or hereafter be conveyed by any grant or devise to be held or used

108 (1951). See Act 280, P.A. 1915; Comp. Laws (1915) §§11099 to 11101; Comp. Laws (1929) §§13512 to 13514; Mich. Stat. Ann. §§26.1191 to 26.1193; Comp. Laws (1948) §§554.351 to 554.353; Act 373, P.A. 1925; Comp. Laws (1929) §§13516 to 13517; Mich. Stat. Ann. §§26.1201 to 26.1202; Comp. Laws (1948) §§554.381 to 554.382; But see *Kemp v. Sutton*, 233 Mich. 249 at 260, 206 N.W. 366 (1925), note 277, *infra*. There are numerous statutes regulating the powers of particular types of eleemosynary and ecclesiastical corporations to convey land, some of which restate and others of which relax the general common-law rule of inalienability, e.g., Act 327, P.A. 1931, §§152, 161, 174, 183, Comp. Laws (1948) §§450.152, 450.161, 450.174, 450.183; Act 80, P.A. 1855, §6, Comp. Laws (1948); §453.236; Act 235, P.A. 1849, §4, Comp. Laws (1948) §457.234; Act 63, P.A. 1917, §5, Comp. Laws (1948) §457.265; Act 29, P.A. 1901, §7, Comp. Laws (1948) §458.87; Act 42, P.A. 1842, §6, Comp. Laws (1948) §458.156.

²²¹ 3 Scott, TRUSTS §348.1 (1939); Blackwell, "The Charitable Corporation and the Charitable Trust," 24 WASH. UNIV. L.Q. REV. 145 (1938). But see *Detroit Osteopathic Hospital v. Johnson*, 290 Mich. 283 at 296-297, 287 N.W. 466 (1939).

²²² St. Germain, DOCTOR AND STUDENT, Dial. 2, c. 35 (ed. 1607). As to the authority of which see 5 Holdsworth, HISTORY OF ENGLISH LAW 266-269 (1924).

²²³ 243 Mich. 279, 220 N.W. 801 (1928).

for any religious, educational, charitable, benevolent or public purpose, with a condition annexed in the instrument of conveyance that in event said lands shall at any time cease to be held or used for the purpose set forth in such conveyance, title thereto shall revert to the grantor or devisor and his heirs, and . . . because of changed conditions or circumstances since the execution of such conveyance it is impossible or impracticable to longer hold or use said lands for the purposes limited in such conveyance and that the religious, educational, charitable, benevolent or public object of the grantor, as set forth in such conveyance, may be defeated thereby, a decree may be entered authorizing the grantor (sic) to sell such lands

"No sale of lands under the decree of the court as herein provided shall defeat the estate of the grantee named in the original conveyance because of the failure to longer hold or use the same for the purpose named in such conveyance and shall be sufficient to convey to the purchaser of such lands a good and sufficient title in fee simple, free from all conditions or limitations whatsoever, under which the same shall theretofore have been held or used." ²²⁴

This statute makes a penalty restraint on alienation by way of condition subsequent ineffective as against alienation pursuant to decree under the statute. By parity of reasoning with the cases holding valid penalty restraints on tortious alienation by a tenant in tail even where a restraint on the same tenant's levying a fine or suffering a recovery would be void, it would seem that the statute does not make such conditions subsequent inoperative if the charitable or public corporation restrained attempts to convey without first securing a decree under the statute. Moreover, the statute has no application to provisions for forfeiture to someone other

²²⁴ Act. 258, P.A. 1925; Comp. Laws (1929) §§13518 to 13521; Mich. Stat. Ann. §§26.1211 to 26.1214; Comp. Laws (1948) §§554.401 to 554.404.

than the original creator of the estate or his heirs. It should be borne in mind, however, that unless the gift over to another on alienation is to a charity, the provision for it must be so worded as to take effect, if at all, within the period of the Rule Against Perpetuities.²²⁵

Another type of provision which restrains alienation in form but not in fact is one for pre-emption. This may be a provision in a conveyance of a fee simple that the taker shall not sell the land without offering the donor or someone else an opportunity to buy, or it may take the form of a pre-emptive option contract by which the owner of land agrees not to sell without first giving the optionee an opportunity to buy. The *Restatement of Property* takes the position that a pre-emptive provision is a restraint on alienation.²²⁶ It asserts, nevertheless, that such a provision is valid if the optionee is required to meet any offer received by the optionor as a condition of exercising his option. If, however, the optionee need pay only a fixed price or a percentage of any offered price, the *Restatement* treats the provision as one governed by the general rules as to restraints on alienation of estates in fee simple.²²⁷ The latter rule, if applied strictly, would avoid all such pre-emptive provisions in Michigan, inasmuch as our law does not admit the validity of limited restraints on alienation of a fee simple.

Probably the leading case adopting the *Restatement's* view that a pre-emptive provision is a direct restraint on alienation is *In re Rosher*,²²⁸ a nineteenth century English decision. That case involved a devise of land in fee simple with a proviso that if the devisee should wish

²²⁵ Scott, TRUSTS §401.6 (1939); PROPERTY RESTATEMENT §397, comment a (1944); Chapters 9, 15, *infra*.

²²⁶ PROPERTY RESTATEMENT §413 (1944).

²²⁷ *Ibid*.

²²⁸ [1884] 26 Ch. Div. 801.

to sell during the life of the testator's wife, she should have an option to purchase for a fixed price which, at the time of the decision, was approximately a fifth of the value of the land. This proviso was held void as a restraint on alienation inconsistent with the nature of an estate in fee simple. The decisions in this country are far from uniform, but there appears to be some tendency to follow the rules laid down by the *Restatement of Property*.²²⁹ As an option is essentially a future interest in land which remains contingent until exercised, it must not, in jurisdictions which follow that rule, exceed in duration the period of the common-law Rule Against Perpetuities, except when it is an option reserved by the creator of the estate subject to it for his own benefit.²³⁰ Consequently pre-emptive provisions are frequently invalid because they violate the Rule Against Perpetuities, even though they may not offend the rule against restraints on alienation of estates in fee simple.

*Windiate v. Lorman*²³¹ was a suit to remove a cloud from title. In 1910 the plaintiff executed an instrument providing,

²²⁹ The cases are collected in Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.67 (1952); Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 YALE L.J. 961, 1186 at 1390-1395 (1935).

²³⁰ PROPERTY RESTATEMENT §§393, 394 (1944); Gray, RULE AGAINST PERPETUITIES, 3d ed., 308-310 (1915); Part Two, notes 362, 364, *infra*. There is dictum in Chief Justice Cooley's opinion in *Smith v. Barrie*, 56 Mich. 314 at 317, 22 N.W. 816 (1885), in favor of the validity of a condition in a conveyance of an estate in fee simple that no sale of the property should be made without first giving to the grantor, or his heirs, the opportunity to purchase. Such a condition does not violate the Rule Against Perpetuities, but it does impose a potentially perpetual indirect restraint on alienation.

²³¹ 236 Mich. 531, 211 N.W. 62 (1926). The facts are more fully stated in the companion case, *Windiate v. Leland*, 246 Mich. 659, 225 N.W. 620 (1929). In *Livonia Township School District v. Wilson*, 339 Mich. 454, *sub nom.* *Wayne County v. Wilson*, 64 N.W. (2d) 563 (1954), a provision in a 1944 deed giving the grantor an option to repurchase for \$80 if, within 25 years, the land should not be used for

"If I ever desire to sell, or if my heirs or devisees shall ever desire to sell (certain land), I will give to Janette Lorman, her heirs, devisees and assigns the first opportunity to buy the said land at the best price, not to exceed \$1,000, which I can get for it from anyone else . . . and upon payment or tender of such price by her, her heirs or assigns, to me, my heirs and devisees, that the land shall be conveyed to her, her heirs or assigns, in fee simple"

The plaintiff, at a time when the land was worth some \$8,000, contended that this pre-emptive option was void and sought its removal as a cloud upon his title. An assignee of the optionee intervened as party defendant and filed a cross-bill for specific performance of the option. The court affirmed a decree for the defendant granting specific performance of the option, saying that the common-law Rule Against Perpetuities was not in force in Michigan so far as real property was concerned and that the option did not offend a statute then in force which forbade suspension of the absolute power of alienation for a period in excess of two lives in being. In a later opinion involving the same option, the court intimated that the common-law Rule Against Perpetuities has no application to option contracts, citing as

school purposes, was treated as valid. The validity of pre-emptive option contracts which required the optionee to meet any offer received by the optionor was assumed in *Hake v. Groff*, 232 Mich. 233, 205 N.W. 145 (1925); *Nu-Way Service Stations, Inc. v. Vandenberg Oil Co.*, 283 Mich. 551, 278 N.W. 683 (1938); *Digby v. Thorson*, 319 Mich. 524, 30 N.W. (2d) 266 (1948); and *Laevin v. St. Vincent de Paul Society*, 323 Mich. 607, 36 N.W. (2d) 163 (1949). Specific performance of such a contract was granted in *Brenner v. Duncan*, 318 Mich. 1, 27 N.W. (2d) 320 (1947). Cf. *Harlow v. Lake Superior Iron Co.* 36 Mich. 105 (1877); *Braun v. Klug*, 335 Mich. 691, 57 N.W. (2d) 299 (1953), note 162, *supra*. In *Epstein v. Mintz*, 226 Mich. 660, 198 N.W. 225 (1924), the defendant, owning land in fee simple, contracted with the plaintiff, a real estate broker, to sell it when the plaintiff so advised and pay the plaintiff a commission on the sale. It was held that the plaintiff was entitled to a commission upon the defendant's refusal to sell when so advised, the court saying that the contract did not restrain alienation but encouraged it.

authority for that statement Section 339 of Gray's *Rule Against Perpetuities* and failing to note that, when the following section of that work is read, it appears that Professor Gray was of the opinion that specifically enforceable options *are* governed by the Rule. The common-law Rule Against Perpetuities now applies to real property in Michigan.²³² Whether the court will follow this doubtful dictum as to its inapplicability to options remains to be seen.

Apart from the Rule Against Perpetuities problem, *Windiate v. Lorman* seems to establish in Michigan a rule, contrary to that of England and the *Restatement of Property*, that a pre-emptive option is never a direct restraint on alienation and is not void under the law of restraints on alienation even when the optionee is entitled to buy at a price which is a small fraction of that offered by others. If the dictum as to the inapplicability of the Rule Against Perpetuities is followed, such an option may have the practical effect of restraining all alienation in perpetuity. Michigan is probably logically correct in holding that a pre-emptive option is not a direct restraint on alienation, but it is certainly a very serious indirect restraint, and it may be questioned whether such restraints should be specifically enforceable in perpetuity.²³³

²³² Act 38, P.A. 1949; §1; Mich. Stat. Ann. §26.49 (1); Comp. Laws (1949) §554.51.

²³³ See: Schnebly, "Restraint Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.66 (1952). The use of a pre-emptive option for the sole purpose of restraining alienation is illustrated by *Stoney Pointe Peninsula Assn. v. Broderick*, 321 Mich. 124, 32 N.W. (2d) 363 (1948). There restrictions in a subdivision provided that if the subdivider did not approve of a vendee to whom a lot owner proposed to sell, the subdivider might repurchase the lot for the original sale price, without compensation for improvements. The circuit court held the option void as a restraint on alienation. The Supreme Court denied specific performance on another ground, without deciding whether the option was a restraint on alienation.

Present Legal Estates for Life

“E STATE for life” is a generic term embracing interests in land of several types. The duration of such an estate may be measured by the life of the tenant himself, by the life of some other person, by the joint lives of a group of persons (i.e., the life of the member of the group who first dies), or by the life of the survivor of a group of persons. In the last two cases the tenant himself may or may not be a member of the group. When the duration of the estate is measured by the life of someone other than the tenant, that person is known as the *cestui que vie* and the estate as one *pur autre vie*. An estate for life may arise by operation of law, as in the case of dower, curtesy, and tenancy in tail after possibility of issue extinct, or it may be created by express limitation or implication in a conveyance or devise. A conveyance creating a life estate may form part of a family settlement, it may be an outright sale, or it may be a commercial lease, reserving rent and differing from an estate for years only in that duration is measured in lives. The incidents of these several types of estate for life are not precisely uniform, but, for most present purposes, they may be considered together.²³⁴

As has been seen, opposition to the alienability of estates in fee simple arose from three sources, the owner's feudal overlord, his tenant, and his heir. As an

²³⁴ 1 Coke, INSTITUTES 41b-42b; Challis, LAW OF REAL PROPERTY, 3d ed., 339-348, 356-363 (1911); Plucknett, CONCISE HISTORY OF THE COMMON LAW 363-364 (1929).

estate for life is not an estate of inheritance, the heir could have no serious opposition to its alienation.²³⁵ Tenants of life tenants have only a slight interest. Alienation of a life estate would rarely interfere with the most valuable of the feudal overlord's incidents of tenure, wardship, marriage, and escheat. There was probably little opposition to the alienability of life estates, and it was unnecessary to provide for it by statute. The common law seems always to have recognized the power of a tenant for life to make an *inter vivos* transfer of his estate.²³⁶ It will be recalled that freehold estates were not transmissible by will at common law²³⁷ and the Statute of Wills of 1540 did not empower the tenant *pur autre vie* to devise his estate.²³⁸ He could, however, accomplish nearly the same result by making a lease to commence at his death,²³⁹ and power to transmit estates *pur autre vie* by will was conferred by statute in 1676.²⁴⁰ Strictly speaking, a life estate was not heritable but, if limited to the tenant and his heirs, or

²³⁵ If an estate *pur autre vie* was limited to a tenant and his heirs, the heir was entitled to it as special occupant after the death of the tenant. Challis, *REAL PROPERTY*, 3d ed., 358 (1911). Such a right is, however, trivial compared with a right to inherit in fee simple or tail.

²³⁶ Anonymous, *Liber Assissarum*, 27 Edw. III, pl. 31 (1353); *Uttly Dale's Case*, Cro. Eliz. 182, 78 Eng. Rep. 439 (1590); 1 Coke, *INSTITUTES* 41b; 3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 123 (1923).

²³⁷ Pollock & Maitland, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 312-328 (1895); note 8 *supra*.

²³⁸ Stat. 32 Hen. VIII, c. 1 (1540) as explained by Stat. 34 & 35 Hen. VIII, c. 5, § 3 (1542); 1 Coke, *INSTITUTES* 111b (Hargrave's Note No. 141 to 13th ed. 1787).

²³⁹ *Barwick's Case*, 5 Co. Rep. 93b, 94b, 77 Eng. Rep. 199 at 201 (1598).

²⁴⁰ Statute of Frauds, 29 Car. II, c. §12 (1676), explained by Stat. 14 Geo. II, c. 20, §9 (1741). The latter statute provided that, when an estate *pur autre vie* was not disposed of by will and there was no special occupant (i.e., the estate was limited to the deceased tenant without mention of his heirs), it should be distributed as personal property of the deceased tenant.

to him and the heirs of his body, the heir took upon intestacy as special occupant.²⁴¹

As in the case of the fee simple, the English common law did not permit the creation of an inalienable life estate. A restraint on alienation by way of prohibition, which would force the life tenant to remain such against his will, was both impossible and void. It was impossible because the life tenant could always destroy his estate by making a tortious conveyance in fee or committing waste.²⁴² It has been seen that entailment is essentially the designation of a peculiar course of descent coupled with a prohibition on alienation. Entailment of an estate *pur autre vie* was effective as a designation of the special occupant but wholly ineffective as a prohibition on alienation. The life tenant could bar the entail by the ordinary forms of inter vivos conveyance and possibly by will.²⁴³ That a prohibition on alienation

²⁴¹ Note 235 *supra*.

²⁴² *Biggot v. Smyth*, Cro. Car. 102, 79 Eng. Rep. 691 (1628) (feoffment in fee); Statute of Gloucester, 6 Edw. I, cc. 5, 7 (1278) (waste; tortious conveyance by dowress); 2 Coke, INSTITUTES 309. There were several other ways in which a tenant for life could divest himself of his estate by forfeiture. 1 Cruise, DIGEST OF THE LAWS OF ENGLAND RESPECTING REAL PROPERTY *112-*114. The Michigan statutes provide that a conveyance of the fee by a life tenant shall not work a forfeiture of his estate [Rev. Stat. 1816. c. 65, §4; Comp. Laws (1857) §2723; Comp. Laws (1871) §4206; How. Stat. §5654; Comp. Laws (1897) §8958; Comp. Laws (1915) §11690; Comp. Laws (1929) §13280; Mich. Stat. Ann. §26.523; Comp. Laws (1948) §565.4] and probably eliminate forfeiture for waste [Rev. Stat. 1846. c. 110, §6; Comp. Laws (1857) §4703; Comp. Laws (1871) §6358; How. Stat., §7945; Comp. Laws (1897) §11121; Comp. Laws (1915) §14945; Comp. Laws (1929) §15120; Mich. Stat. Ann. §27.2146; Comp. Laws (1948) §690.406]. They recognize, however, that life estates may be destroyed by disseisin, forfeiture, surrender or merger. Rev. Stat. 1846, c. 62, §32; Comp. Laws (1857) §2616; Comp. Laws (1871) §4099; Comp. Laws (1897) §8814; How. Stat., §5548; Comp. Laws (1915) §11550; Comp. Laws (1929) §12952; Mich. Stat. Ann. §26.32; Comp. Laws (1948) §554.32. See note 263 *infra*.

²⁴³ *Doe ex dem. Blake v. Luxton*, 6 T.R. 289, 101 Eng. Rep. 558 (1795); 1 Cruise, DIGEST OF THE LAWS OF ENGLAND RESPECTING REAL PROPERTY *106-*108; Challis, LAW OF REAL PROPERTY, 3d ed., 362-363 (1911).

in a conveyance of an estate for life is void is well settled in England ²⁴⁴ and is the prevailing view in this country.²⁴⁵

The position of the English common law as to the validity of a penalty restraint on alienation of a legal estate for life is not so certain. At common law a conveyance by a life tenant of a greater estate than he had forfeited his estate and destroyed reversions and remainders expectant upon it. There is dictum in a fifteenth century opinion that a condition against alienating in fee may be imposed upon a life estate.²⁴⁶ This is no doubt sound because, as has been seen, tortious alienation may always be restrained by penalty. The two grounds upon which the fourteenth and fifteenth century judges ruled that penalty restraints on alienation of estates in fee simple were void, that the statute *Quia Emptores Terrarum* conferred an inseparable incident of alienability upon every estate in fee simple and prohibited a reversion or remainder following such an estate,²⁴⁷ have no application to estates for life. The statute did not apply to life estates and they may, indeed, must, be followed by a reversion or remainder. The stress laid upon the existence of a reversion or remain-

²⁴⁴ *Brandon v. Robinson*, 18 Ves. Jr. 429, 34 Eng. Rep. 379 (1811); *Graves v. Dolphin*, 1 Sim. 66, 57 Eng. Rep. 503 (1826); see *Rochford v. Hackman*, 9 Hare 475 at 482, 68 Eng. Rep. 597 (1852). These cases involved equitable life estates but the rule applies with greater force to legal life estates. Sweet, "Restraints on Alienation," 33 L.Q. REV. 236 at 244 (1917).

²⁴⁵ The cases are collected in Gray, RESTRAINTS ON ALIENATION, 2d ed., 134-277 (1895); Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.49 (1952); Manning, "The Development of Restraints on Alienation Since Gray," 48 HARV. L. REV. 373 at 394-398 (1935); Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 YALE L.J. 961, 1186 at 1208 (1935). *Accord*: PROPERTY RESTATEMENT §405 (1944).

²⁴⁶ Anonymous, Y.B. 10 Hen. VII, Mich., pl. 28 (1494). See notes 242 *supra* and 263 *infra*.

²⁴⁷ Notes 114, 115 *supra*.

der in the cases holding valid penalty restraints on alienation of estates in fee tail and for years²⁴⁸ suggests the validity of such restraints on life estates. The reversioner or remainderman whose estate follows a life estate has a greater interest in the personal characteristics of the life tenant than have reversioners and remaindermen whose interests succeed estates tail or long terms of years. Professor John Chipman Gray thought that penalty restraints on alienation of legal estates for life were valid under the English common law but, with one exception, the cases he cited in support of this proposition involved equitable life estates.²⁴⁹ There are nineteenth century English cases which assume the validity of such a restraint on a legal estate for life.²⁵⁰ Although the rule as to equitable life estates is probably otherwise,²⁵¹ it would seem that the English law permits such

²⁴⁸ Anonymous, Y.B. 21 Hen. VI, Hil., pl. 21 (1443); Anonymous, Y.B. 8 Hen. VII, Hil., pl. 3 (1493); Anonymous, Y.B. 10 Hen. VII, Mich., pl. 28 (1494); Anonymous, Y.B. 13 Hen. VII, Pasch., pl. 9 (1498); Anonymous, 1 Dyer 45a, 73 Eng. Rep. 97 (1539); Newis v. Lark, 2 Plow. 403, 75 Eng. Rep. 609 (1571); Earl of Arundel's Case, 3 Dyer 342b, 73 Eng. Rep. 771 (1575); Croker v. Trevethin, Cro. Eliz. 35, 78 Eng. Rep. 301 (1584); Ruddall v. Miller, 1 Leon. 298, 74 Eng. Rep. 271 (1586); Arton v. Hare, Poph. 97, 79 Eng. Rep. 1207 (1595); Sharington v. Minors, Moore K.B. 543, 72 Eng. Rep. 746 (1599); Anonymous, 1 Brownl. & Golds. 44, 123 Eng. Rep. 655 (1616); Muschamp v. Bluet, J. Bridg. 132, 123 Eng. Rep. 1253 (1617); Crusoe ex dem. Blencowe v. Bugby, 3 Wils. K.B. 234, 95 Eng. Rep. 1030 (1771); Roe ex dem. Hunter v. Galliers, 2 T.R. 133, 100 Eng. Rep. 72 (1787); Doe ex dem. Mitchinson v. Carter, 8 T.R. 57, 101 Eng. Rep. 1264 (1798). Lord Kenyon's opinion in the last case seems to approve all penalty restraints on alienation except those on estates in fee simple and on barring an entail by common recovery or statutory fine. *Id.* at 61.

²⁴⁹ RESTRAINTS ON ALIENATION, 2d ed., 72-73 (1895). As Gray pointed out, the *ratio decidendi* of the first case holding valid a penalty restraint on alienation of an equitable life estate, Lockyer v. Savage, 2 Strange 947, 93 Eng. Rep. 959 (1733), is the analogy to restraints in leases for years. This reasoning is equally applicable to a legal life estate. The one exception is the first case cited in note 250 *infra*.

²⁵⁰ Craven v. Brady, L.R. 4 Eq. 209 (1867); Blackman v. Fysh, [1892] 3 Ch. 209 (Ct. App.).

²⁵¹ Re Mair, Williamson v. French, [1909] 2 Ch. 280.

restraints on legal estates only if they benefit the reversion or remainder, and that they are void if solely for the protection of the life tenant himself or of a stranger to the title to the land involved.²⁵²

The American cases tend, like the English, to hold valid a provision in a conveyance creating an estate for life for forfeiture of the estate upon alienation, voluntary or involuntary, although there are a few cases holding such provisions invalid and a few holding, illogically, a provision for forfeiture to someone other than the creator of the estate valid, but one for forfeiture to the creator of the estate void.²⁵³ The *Restatement of Property* takes the position that a provision in a conveyance of a life estate for forfeiture upon alienation is valid whether the forfeiture is to the creator of the estate or another.²⁵⁴ So far it reflects settled English law. The *Restatement* goes beyond this, however, by asserting the validity of penalty restraints on alienation of estates for life which are not imposed for the benefit of the reversioner or remainderman. Thus it declares that a life tenant may provide validly in a conveyance of his entire estate that the transferee will forfeit the estate by alienation.²⁵⁵ Such a

²⁵² Sweet, "Restraints on Alienation," 33 L.Q. REV. 236 at 244 (1917); Bordwell, "Alienability and Perpetuities," 23 IOWA L. REV. 1 at 11-13 (1938). This conclusion seems inevitable from the principles upon which the cases referred to in notes 247 and 248, *supra*, are grounded.

²⁵³ The cases are collected in Gray, RESTRAINTS ON ALIENATION, 2d ed., 72-89 (1895); Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.50 (1952); Manning, "The Development of Restraints on Alienation Since Gray," 48 HARV. L. REV. 373 at 394-398 (1935); Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 YALE L.J. 961, 1186 at 1207-1211 (1935).

²⁵⁴ PROPERTY RESTATEMENT §409, Illustrations 1, 6 (1944).

²⁵⁵ *Id.* Illustration 3. Comment *a* states that the normal objective of a restraint on alienation of an estate for life is the protection of the life tenant against his own indiscretions. It asserts that this is a worthy objective which ought to be carried out in the absence of substantial social objection. This was not the normal objective sought

provision violates the rule implicit in the English cases that a valid restraint upon alienation of a legal estate may be imposed only by the creator of the estate for the benefit of his reversion or of a remainder limited after the estate. Although it does not explicitly so state, the *Restatement* would appear to consider valid a contract against alienation entered into between a life tenant and a stranger to the title, such as a neighboring proprietor. These extensions of the rules governing the validity of restraints on alienation of legal life estates seem inconsistent in principle with the doctrine of estates upon which our land law is founded.²⁵⁶

In general, the Michigan statutes recognize legal life estates and accord to them the incidents which they had at common law. From 1847 to 1949 there were some statutory provisions which made important changes in the common law of estates for life, and there are still

to be accomplished by such a restraint in the period during which the incidents of legal life estates became fixed. 7 Holdsworth, *HISTORY OF ENGLISH LAW* 240-241 (1926). The normal objective in that period was the protection of the reversioner against having his land and buildings injured by an evil or incompetent tenant, and it was the worthiness of *this* objective which led to decisions that restraints on alienation of life estates were valid. The preface to the second edition of Gray's *RESTRAINTS ON ALIENATION* (1895) is a forceful refutation of the view that "the protection of the life tenant against his own indiscretion" is a "worthy objective." As he points out, the placing of an owner of property of full age and sound mind under a sort of guardianship to ensure that his wrongdoing will injure only others and not himself is likely to weaken his character and harm society. Despite Gray's vigorous objections, the objective of protecting the owner has been recognized as a proper basis for restraints on alienation of interests under trusts. This is no reason for extending such recognition to legal estates. As Mr. Manning has observed, the legal life tenant who is in possession of the land is much more likely to secure credit on the basis of his apparent power of alienation than is the beneficiary under a trust of land in the possession of a trustee. Manning, "The Development of Restraints on Alienation Since Gray," 48 *HARV. L. REV.* 373 at 398 (1935).

²⁵⁶ 2 Simes, *LAW OF FUTURE INTERESTS* 310 (1936).

some provisions which have a bearing on the validity and effect of restraints on alienation of such estates.²⁵⁷

²⁵⁷ Chapter 62 of the Revised Statutes of 1846 provided as follows:

"Sec. 5. Estates . . . for life shall be denominated estates of freehold; . . .

"Sec. 6. An estate for the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold only during the life of the grantee or devisee, but after his death it shall be deemed a chattel real.

"Sec. 17. Successive estates for life shall not be limited unless to persons in being at the creation thereof; and when a remainder shall be limited on more than two (2) successive estates for life, all the life estates subsequent to those of the two (2) persons first entitled thereto, shall be void, and upon the death of these persons, the remainder shall take effect, in the same manner as if no other life estate had been created.

"Sec. 18. No remainder shall be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate, unless such remainder be in fee; nor shall any remainder be created upon such an estate in a term for years, unless it be for the whole residue of the term.

"Sec. 19. When a remainder shall be created upon any such life estate, and more than two (2) persons shall be named as the persons during whose lives the estate shall continue, the remainder shall take effect upon the death of the two (2) persons first named, in the same manner, as if no other lives had been introduced.

"Sec. 21. No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

"Sec. 24. Subject to the rules established in the preceding sections of this chapter, a freehold estate, as well as a chattel real, may be created to commence at a future day, an estate for life may be created in a term of years, and a remainder limited thereon.

"Sec. 27. A remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder shall be construed a conditional limitation and shall have the same effect as such a limitation would have by law.

"Sec. 29. When a remainder on an estate for life, or for years, shall not be limited on a contingency, defeating or avoiding such precedent estate, it shall be construed as intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years."—Comp. Laws (1857) §§2589, 2590, 2601, 2602, 2603, 2605, 2608, 2611, 2613; Comp. Laws (1871) §§4072, 4073, 4084, 4085, 4086, 4088, 4091, 4094, 4096; Comp. Laws (1897) §§8787, 8788, 8799, 8800, 8801, 8803, 8806, 8809, 8811; How. Stat. §§5521, 5522, 5533, 5534, 5535, 5537, 5540, 5543, 5545; Comp. Laws (1915) §§11523, 11524, 11535, 11536, 11537, 11539, 11542, 11545, 11547; Comp. Laws (1929) §§12925, 12926, 12937, 12938, 12939, 12941, 12944, 12947, 12949; Mich. Stat. Ann. §§26.5, 26.6, 26.17, 26.18, 26.19, 26.21, 26.24,

*St. Amour v. Rivard*²⁵⁸ was a suit to construe a will which was executed in 1837 and became effective upon the death of the testator in 1841. After devising life estates in land to nine persons, the will provided,

“Every single disposal of real estate made in this my testament, is only for the use and benefit of him or her in whose favor it is made, his or her *life lasting*, and that it is my formal will that neither my real estate nor any parcel thereof, will ever be sold or alienated in whatsoever manner—but that after the decease of those several to which shares or parcels of my real estate have been assigned, the said shares or parcels will remain for the use and benefit of the descendants of him or her to whom a shares (sic) has been assigned, their lives lasting, and so on, and in case of demise *without posterity*, the said share will accrue to the *use and benefit* of the owner or of the owners being of my relation or descendants, their *life lasting*, of the next share or shares, and so on as long as *any posterity* will exist, and in case of extinction to the *next heirs*.”

The named devisees, who were also some of the heirs at law of the testator, conveyed their interests to the plaintiff, who sought a determination that the will was void *in toto* and that he was entitled to partition. The court decided that the will was designed to set up a perpetual succession of inalienable life estates. Rejecting a suggestion of counsel that the testator's intention could be carried out in part by ruling that the named devisees took estates for life with remainders in fee simple to their heirs, the court held that the entire will was void under the common-law Rule Against Perpetuities, in

26.27, 26.29; Comp. Laws (1948) §§554.5, 554.6, 554.17, 554.18, 554.19, 554.21 554.24, 554.27, 554.29. The effect of these statutes is discussed in detail in Chapter 19, *infra*. Sections 17, 18 and 19 were repealed by Act 38, P.A. 1949, §2, Mich. Stat. Ann. §26.49(2); Comp. Laws (1948) §554.52, as to conveyances executed and wills becoming effective after September 23, 1949.

²⁵⁸ 2 Mich. 294 (1852), Part Two, notes 39, 536, *infra*.

force in Michigan before 1847 and since 1949. Consequently the heirs of the testator took the land in fee simple, free of the prohibition on alienation imposed by the will.²⁵⁹

*Hayward v. Kinney*²⁶⁰ was a suit to foreclose a mortgage given by Francis H. Strong in November, 1866. In June, 1866, when Francis H. Strong, Joseph T. Strong, Chester W. Strong, and Gertrude J. Cole were tenants in common in fee simple of the land, the last three united in a quit-claim deed to Francis H. Strong,

"during his natural life-time, and his heirs and assigns of his heirs, forever, but not to be conveyed during the life-time of the said Francis H. Strong."

The defendant Kinney, a purchaser on execution sale against Francis H. Strong, contended that the quoted language imposed an effective prohibition on alienation of the life estate in three-quarters of the land conveyed by the deed, so as to make a voluntary conveyance or mortgage by Francis H. Strong ineffective. The court rejected this contention, saying,

"These words, if effectual for any purpose, operate, and were evidently intended, as a condition subsequent. The deed created a life-estate merely in three-fourths of the premises, and the insertion of the words served to

²⁵⁹ It may be that such a perpetual succession of life estates should be held void under the ancient common-law rule that a remainder may not be limited to the unborn child of an unborn person, rather than under the more recently developed Rule Against Perpetuities. See *Whitby v. Mitchell*, L.R. 44 Ch. Div. 85 (1890); 1 FEARNE, CONTINGENT REMAINDERS, 10th ed., 251, 565 (Butler's note) (1844); *Sir Hugh Cholmley's Case*, 2 Co. Rep. 50a, 51b, 76 Eng. Rep. 527 at 530 (1597); Bordwell, "Alienability and Perpetuities," 25 IOWA L. REV. 1 at 9-22 (1939); Part Two, note 13, *infra*. This is known variously as the old rule against perpetuities, the rule against double possibilities, and the rule in *Whitby v. Mitchell*. But see 2 Simes, LAW OF FUTURE INTERESTS 339-341 (1936). In any event, the result reached in *St. Amour v. Rivard* seems sound. Simes, *id.*, 428-429.

²⁶⁰ 84 Mich. 591, 48 N.W. 170 (1891).

make that an express condition which at common law was implied in every estate for life or years. 2 Bl. Comm. 153. Such a condition, however, defeats the estate to which it is annexed only at the election of him who has a right to enforce it.”²⁶¹

The decision construes language of prohibition as a condition imposing a penalty restraint of forfeiture on alienation. As the cited passage in Blackstone relates to the common-law rule that a conveyance in fee by a life tenant forfeited his estate, it would seem that the court thought the condition was only against tortious alienation of the fee, not against mere alienation of the life estate itself.²⁶² If so, the validity of the condition is supported by ancient authority.²⁶³ The case does not, then, decide whether a restraint on alienation of a life estate, by prohibition or penalty, is valid.

*Lariverre v. Rains*²⁶⁴ was a suit to quiet title brought by Peter Lariverre and Joseph Lariverre, Jr. In 1883 Julia L. White executed an instrument which was, in effect, a covenant to stand seized, conveying to her husband, Edward, “the use and occupancy as long as he

²⁶¹ *Id.* at 599.

²⁶² Note 242 *supra*.

²⁶³ Note 246 *supra*. At common law a conveyance by a life tenant of a greater estate than he had, by feoffment, fine or recovery, forfeited his estate, destroyed contingent remainders dependent upon it, and complicated the enforcement of reversions and vested remainders. Until 1540, his suffering a common recovery barred even reversions and vested remainders. Stats. 32 Hen. VIII, c. 31 (1540); 14 Eliz., c. 8 (1572); Bordwell, “Alienability and Perpetuities,” 24 IOWA L. REV. 1 at 57-58 (1938); 25 IOWA L. REV. 1 at 24 (1939). Such a conveyance by lease and release, bargain and sale, or covenant to stand seized did not have these effects, however, these being deemed “innocent” conveyances which passed only such estates as the conveyor had. As the innocent types of conveyances were invented after 1494 and as our statutes make all types of conveyance innocent (note 242 *supra*) it could be argued that a penalty restraint upon alienation in fee by a life tenant should have no greater validity than one upon alienation of the life estate itself. See 4 Kent, COMMENTARIES ON AMERICAN LAW *82-84, *427-428; PROPERTY RESTATEMENT §124, comment *e* (1936).

²⁶⁴ 112 Mich. 276, 70 N.W. 583 (1897).

shall live, in case he lives with her as long as she shall live, and sees fit to occupy the same as a residence and home" the west half of the tract of land involved. The instrument then conveyed to Joseph Lariverre, Sr., son of the donor and father of the plaintiffs, "the use and occupancy of the east half of (the tract) during his life, providing he sees fit to use and occupy the same so long as a home and residence," and proceeded as follows:

"and by these presents conveys absolutely, subject to the above conditions, all of said (tract of land) to her said grandchildren, Joseph and Peter Lariverre, children of the said Joseph, her son, or to his heirs; it being expressly understood that, if her said son Joseph shall have more children at the time of his death, they shall share and share alike the said property. It is further understood that in case of her death, and the death of her said husband, before the death of her said son Joseph, then he, her said son Joseph, shall have the use and occupancy during his life of (the whole tract) on the terms and conditions above specified, to wit, to be used and occupied by him as a home and residence. It being expressly understood and agreed that the right to use and occupy, as above stated, is intended to be a life interest, and not transferable so far as the said Edward White and Joseph Lariverre, Sr., are concerned."

In 1889 Julia L. White executed a conveyance in fee of the east half of the tract to her son Joseph Lariverre, Sr. and he executed a like conveyance to Maria B. Doyle. In the same year Julia L. White and Edward White executed a conveyance in fee of the west half of the tract to Maria B. Doyle. Maria B. Doyle took possession of the whole tract in 1889 and conveyed it to the defendants in 1890. Julia L. White died while the suit was pending, but Edward White and Joseph Lariverre, Sr., were alive when the case was decided. The court held that the actions of Edward White and Joseph Lariverre,

Sr., in ceasing to occupy the land and attempting to convey to Maria B. Doyle, terminated their life estates and that the plaintiffs, remaindermen, were entitled to immediate possession, notwithstanding the fact that the two life tenants were still alive. The opinion contains no discussion of the validity of restraints on alienation and cites as authority for the result reached only *Ryder v. Flanders*,²⁶⁵ a case which has little bearing on the real problems involved.

As it had in *Hayward v. Kinney*,²⁶⁶ the court in *Lariverre v. Rains* construed language which, taken literally, purported to prohibit alienation, as a provision for forfeiture on alienation. As the provisions of the instrument relative to occupancy were couched in language of limitation, this construction was probably sound. The court did not consider the possible application to that part of the instrument which concerned the west half of the tract of the Michigan statute then in force which invalidated more than two successive life estates.²⁶⁷ Probably the application of that statute would not have affected the result. The court also failed to consider the statute, which is still in force, providing that when a remainder on an estate for life shall not be limited on a contingency, defeating or avoiding the life estate, it shall be construed as intended to take effect only on the death of the life tenant.²⁶⁸ If the latter statute applied

²⁶⁵ 30 Mich. 336 (1874). This case involved a devise to the testator's widow during the term of her natural life, should she so long remain his widow and unmarried, and then "in either case" to his children. The widow remarried and, after one child had died, joined with some of the children in a conveyance to the other children. All that was decided was that the grantees in this deed owned the whole fee which, as the court pointed out, would be the case whether or not the limitation over on remarriage was valid.

²⁶⁶ Note 260 *supra*.

²⁶⁷ Rev. Stat. 1846, c. 62, §17, note 257 *supra*.

²⁶⁸ Rev. Stat. 1846, c. 62, §29, note 257 *supra*.

to the disposition in *Lariverre v. Rains*, it would seem that, upon the forfeiture of the estates of Edward White and Joseph Lariverre, Sr., the land would revert to Julia L. White and her heirs until the death of Edward and Joseph, Sr. It may be that the language limiting the remainder to the grandchildren was sufficient to prevent the operation of the statute; that is, to provide that they should take whenever and however the life estates were terminated.

Lariverre v. Rains has been cited as something of a leading case in support of the proposition that penalty restraints on alienation of estates for life are valid. The opinion throws disappointingly little light on the problem. The conveyances by the life tenants were in fee, so the case may stand only for the ancient rule that restraints on tortious alienation are valid.²⁶⁹ Moreover, the occupancy provisions of the instrument involved seemed to be given more weight by the court in reaching its conclusion than the language prohibiting alienation.

*Hamilton v. Wickson*²⁷⁰ was a suit to enjoin an action of ejectment. In 1870 Norman Hamilton leased 160 acres to John and Adah Hamilton for the life of the survivor, reserving rent of a dollar a year. The lease provided,

"And it is expressly understood, declared, and agreed by and between the parties hereto, and these presents are made upon the express condition, that the term hereby created shall not in any case be assignable by the said parties of the second part, or either of them, or by the survivor of them, nor shall the same be taken in execution, or be mortgaged, pledged, or in any way aliened; and that in the event of the said term hereby granted

²⁶⁹ See notes 246 and 263 *supra*.

²⁷⁰ 131 Mich. 71, 90 N.W. 1032 (1902).

and created, or the said demised premises, being assigned, mortgaged, pledged, or in any way aliened, sold, or taken in execution, or the said parties of the second part, or either of them or the survivor of them, becoming bankrupt or insolvent, or in case of the nonperformance of the covenants aforesaid, that then in either or any of such case or cases, the said term or estate hereby created or intended so to be shall immediately cease and determine, and these presents become void, and the said demised premises at once revert to the said party of the first part, his heirs, executors, administrators or assigns, and he or they be thereupon at liberty to enter upon said demised premises, either with or without formal demand for possession thereof, and the same to have again as of his or their forever (sic) estate, notwithstanding the said parties of the second part, or the survivor of them, may still be alive, anything herein contained to the contrary notwithstanding."

Norman Hamilton died in 1874, devising the premises, subject to the lease, to the defendants *pur autre vie*, with contingent remainder to the sons of John Hamilton living at the death of the survivor of John and Adah Hamilton. In 1888 John and Adah Hamilton executed a deed purporting to convey a 50-foot strip of the land to a railroad. John Hamilton died in 1891, and the defendants commenced the action of ejectment sought to be enjoined against Adah Hamilton, claiming that the life estate was forfeited by breach of a covenant to repair and of the condition against alienation. The court reversed a decree which enjoined prosecution of the action of ejectment, saying, without other discussion or citation of authority on the restraint on alienation problem,

"It seems not to be contested that, if the lease is a subsisting, binding agreement, its covenants have been brok-

en in such manner as to entitle the remainder-men to re-enter." ²⁷¹

The decision in *Hamilton v. Wickson* probably supports the proposition that a provision in a conveyance of a life estate that the estate shall be forfeited to the reversioner upon alienation by the life tenant is valid. Yet in it, as in the earlier cases, the alienation by the life tenants was a conveyance in fee.²⁷² Moreover, the effect of the decision is much weakened by the fact that it is based in part upon breach of the covenant to repair. In view of the facts that Norman and John Hamilton were brothers and that the life lease was, in some sense, a family settlement, it seems doubtful that the condition against alienation should be construed to forfeit the entire 160 acres upon alienation of a 50-foot strip.²⁷³

Heinze v. Heinze ²⁷⁴ was an action of assumpsit for use and occupation. The defendant, in consideration of one dollar, gave his mother a life lease of land providing that the lessee should not sublet without the written consent of the lessor. The defendant remained in possession and the mother's administrator brought this action after her death. The court, without discussion of the validity of the provision against subletting, held that consent in writing was not required for a subletting to the lessor himself.

²⁷¹ *Id.* at 76. The plaintiffs, Adah Hamilton, widow of John, and their children, relied primarily on a theory of resulting trust arising from the fact that John had paid the consideration for the original conveyance in fee to Norman, made prior to 1860. The court rejected this theory on the grounds the acceptance of the lease estopped the lessees from asserting title in fee and that the Michigan statutes have abolished resulting trusts. Rev. Stat. 1846, c. 63, §7; Comp. Laws (1857) §2637; Comp. Laws (1871) §4120; How. Stat. §5569; Comp. Laws (1897) §8835; Comp. Laws (1915) §11571; Comp. Laws (1929) §12973; Mich. Stat. Ann. §26.57; Comp. Laws (1948) §555.7.

²⁷² See notes 246 and 263 *supra*.

²⁷³ PROPERTY RESTATEMENT §409, comment g.

²⁷⁴ 195 Mich. 365, 162 N.W. 121 (1917).

Hess v. Haas ²⁷⁵ was a suit to enjoin assertion of a forfeiture of a life estate. In September, 1913, James Hess executed a lease of a farm to the plaintiff for the term of her life, to commence at his death. The lease contained a covenant against assignment, transfer, or subletting without the written assent of the lessor, and a provision for termination and re-entry by the lessor upon breach of any covenant. James Hess married the plaintiff in November 1913, divorced her in 1917, and died in 1922, devising the land to the defendants. The plaintiff leased the farm to one Laskey for a term of three years, and the defendants declared a forfeiture. The circuit court entered a decree for the plaintiff on the ground that a covenant against alienation of a life estate is void as an unreasonable restraint on alienation. This decree was affirmed on the ground that the covenant against alienation, which was part of a printed form of lease, had been inserted by mutual mistake. Three justices dissented, asserting that *Lariverre v. Rains* ²⁷⁶ had held that forfeiture restraints upon assignment or subletting, inserted for the protection of the lessor, were valid in leases for life to the same extent as in leases for years. The majority opinion does not categorically deny this proposition but, by pointing out that the decision in *Lariverre v. Rains* was based largely upon the occupancy limitations involved in that case, throws some doubt upon the assertion of the dissenting justices.

Kemp v. Sutton ²⁷⁷ was a suit to construe a will devising

²⁷⁵ 230 Mich. 646, 203 N.W. 471 (1925).

²⁷⁶ Note 264 *supra*. In *Braun v. Klug*, 335 Mich. 691 at 695, 57 N.W. (2d) 299 (1953), note 162 *supra*, there is dictum to the effect that a restriction on alienation is not repugnant to the grant of a life estate. The case held that a covenant in a conveyance in fee simple against alienation to anyone except the grantors and their heirs was void.

²⁷⁷ 233 Mich. 249, 206 N.W. 366 (1925), Part Three, notes 61, 338, *infra*.

land to the testator's widow and four sons and the survivors and survivor of them during their natural lives, remainder upon the death of the survivor to the City of Sault Ste. Marie in fee simple. The will provided,

"I further order and direct as a condition precedent to the enjoyment, devise and ownership and use of the life estates and interests herein devised, that each and all of the said devisees above named are absolutely prohibited, from in any wise selling, mortgaging or incumbering, in any manner whatever, any part or portion of the said property above devised to them and each of them, and upon any violation of the same by any or all of the said devisees as to the same in this item set out; then I direct that each devisee or devisees so violating this item shall forfeit the share and portion herein devised to them and the same shall revert to, and become the property of the other devisees above mentioned in the shares and under the terms herein set out in this my will."

The court held that the will gave the individual devisees a single legal joint life estate for the life of the survivor,²⁷⁸ and that this disposition did not violate a statute which was in force from 1847 to 1949 providing that the absolute power of alienation should not be suspended by a limitation, condition, or future estate for longer than two lives in being.²⁷⁹ The opinion does not mention the

²⁷⁸ This seems irreconcilable with other decisions that a conveyance to several persons as joint tenants and to the survivor creates a joint estate for the life of the first to die, with remainder to the survivor. Note 167 *supra*.

²⁷⁹ Chapter 62 of the Revised Statutes of 1846 provided,

"Sec. 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended when there are no persons in being, by whom an absolute fee in possession can be conveyed.

"Sec. 15. The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two (2) lives in being at the creation of the

Michigan statutes then in force which prohibited more than two successive life estates²⁸⁰ and does not discuss the validity of the quoted provision for forfeiture upon alienation other than to say that all the life tenants could unite with the city to convey a fee or release to a purchaser from the city. The opinion has an important bearing on the validity of restraints on alienation imposed between 1847 and 1949, however, in that it indicates that such a restraint was not affected by the mentioned statute prohibiting suspension of the absolute power of alienation so long as persons in being could unite to convey a fee simple.

The Michigan law of restraints on alienation of estates for life is not so certain as that relating to restraints on estates in fee simple. The denial in *Mandlebaum v. McDonell*²⁸¹ of the validity of prohibitions on alienation, which would operate to force an owner to remain such against his will, probably extends to all legal estates. None of the cases involving restraints on life estates contains a thorough discussion of the problem, but it is probable that our law as to penalty restraints is the same as the English, that is, a provision for forfeiture on alien-

estate, except in the single case mentioned in the next section.

"Sec. 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first (1st) remainder is limited shall die under the age of twenty-one (21) years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age."—Comp. Laws (1857) §§2598, 2599, 2600; Comp. Laws (1871) §§4081, 4082, 4083; Comp. Laws (1897) §§8796, 8797, 8798; How. Stat. §§5530, 5531, 5532; Comp. Laws (1915) §§11532, 11533, 11534; Comp. Laws (1929) §§12934, 12935, 12936; Mich. Stat. Ann. §§26.14, 26.15, 26.16; Comp. Laws (1948) §§554.14, 554.15, 554.16; repealed as to conveyance executed and wills becoming effective after September 23, 1949 by Act 38, P.A. 1949, §2; Mich. Stat. Ann. §26.49 (2); Comp. Laws (1948) §554.52. These statutes are discussed in detail in Chapters 18, 20, and 21, *infra*.

²⁸⁰ Rev. Stat. 1846, c. 62, §§17, 18, 19, note 257 *supra*, discussed in detail in Chapter 19, *infra*.

²⁸¹ 29 Mich. 78 at 83-91 (1874).

er the forfeiture is to the creator of the estate or another. As to inter vivos conveyances, the statute avoiding conditions which are merely nominal and evince no intention of actual and substantial benefit to the party in whose favor they are to be performed must be borne in mind.²⁸² A condition in a conveyance creating a life estate is valid whether there is certainly nothing in the Michigan cases to suggest that a restraint imposed for the benefit of anyone other than a reversioner or remainderman would be enforced.

The Michigan statutes empower the circuit courts in chancery to direct the sale of land in fee simple upon petition by a legal life tenant and a showing that the rights of the interested parties would otherwise be jeopardized.²⁸³ The statute itself provides that,

"No sale or conveyance of any kind shall be made of any property contrary to any specific provisions in regard thereto contained in the deed of conveyance, or in the will under which the petitioner holds the said property."²⁸⁴

Accordingly, it would seem that a prohibition on the life tenant's compelling a sale of the remainder would be valid. The validity of a provision in a conveyance creating a life estate for forfeiture of his estate in the event of the life tenant's filing a petition under the statute remains undecided.²⁸⁵

²⁸² Comp. Laws (1948) §554.46, notes 143, 145 *supra*.

²⁸³ Act §14, P.A. 1915, c. 19, §§62 to 70; Comp. Laws (1915) §§12716 to 12724; Comp. Laws (1929) §§14404 to 14412; Mich. Stat. Ann. §§27.1188 to 27.1196; Comp. Laws (1948) §§619.62 to 619.70. This is a reenactment of Act 233, P.A. 1887, as amended, Comp. Laws (1897) §§9234 to 9242. See PROPERTY RESTATEMENT §124, comment i; §179, note (1936).

²⁸⁴ Sec. 70.

²⁸⁵ See PROPERTY RESTATEMENT, Div. IV, Pt. II, Introductory Note (1944); Cf. *id.*, §§428, 437.

CHAPTER 5

Present Legal Estates for Years

LEASES for years were known as early as the twelfth century, but they can scarcely be said to have created estates in land until the latter part of the fifteenth. Until the third decade of the thirteenth century, the lessee's interest was a purely contractual right, specifically enforceable by means of the action of covenant, against the lessor and the latter's heir. He had no rights at all against the lessor's overlord, persons to whom the lessor transferred the fee, or strangers.²⁸⁶ After 1235 the lessee had a remedy for recovery of possession from a transferee of the lessor who ejected him.²⁸⁷ In the early part of the fourteenth century he acquired a right to maintain an action of trespass for money damages against a stranger who ousted him,²⁸⁸ but he could not recover possession from such a stranger²⁸⁹ until late in the following century.²⁹⁰

From the fact that the interest of a lessee for years was looked upon as being in the nature of a chose in action rather than property, it might be assumed that it was inalienable. Such was not the case. From an early period a term of years was held to be assignable *inter vivos*,²⁹¹

²⁸⁶ 2 Pollock & Maitland, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 105-117 (1895).

²⁸⁷ *Snane v. Rumenal*, Bract. N.B., pl. 1140 (1235).

²⁸⁸ *Star v. Anonymous*, Y.B. 15 Edw. II, Hil., ff. 458, 458b (1321).

²⁸⁹ *Anonymous*, Y.B. 33 Hen. VI, Mich., pl. 19 (1455).

²⁹⁰ *Anonymous*, Y.B. 7 Edw. IV, Pasch., pl. 16 (1467); *Anonymous*, Y.B. 21 Edw. IV, Mich., pl. 2 (1482); 3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 213-217 (1923).

²⁹¹ *Fitz Henry v. Utdeners*, Bract. N.B., pl. 804 (1233); Littleton, *TENURES* §319 (1481).

and, as it was looked upon as a chattel rather than as an estate in land, it was always transmissible by will.²⁹² Involuntary alienability of terms for years was more complete than that of estates in fee and for life. Whereas, in the case of freehold estates, creditors could not acquire title but only a right to occupy until their claims were paid,²⁹³ a leasehold estate could be seized and sold outright on execution.²⁹⁴

As in the case of the estate for life, it was practically impossible at common law to create an inalienable estate for years, one which the tenant was bound to keep against his will, because a tortious conveyance by the tenant of a greater estate than he held²⁹⁵ or the commission of waste²⁹⁶ forfeited his estate. It is probable that the common law asserted the nullity of prohibitory restraints on alienation of estates for years before the era of reported cases.²⁹⁷ The dearth of English authority on the point indicates that conveyancers always believed that restraints on alienation of leasehold interests by way of prohibition

²⁹² Note 286 *supra*; 3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 213-217 (1923).

²⁹³ Statute of Westminster II, 13 Edw. I, stat. 1, c. 18 (1285).

²⁹⁴ *Ibid.*; Gilbert, *LAW OF EXECUTIONS* 19 (1763); Doe ex dem. Mitchinson v. Carter, 8 T.R. 57, 101 Eng. Rep. 1264 (1798).

²⁹⁵ Metteforde's Case, 3 Dyer 362b, 73 Eng. Rep. 813 (1578); Read v. Erington, Cro. Eliz. 322, 78 Eng. Rep. 571 (1594). 1 Coke, *INSTITUTES* 251b, 330a (Butler's Note No. 285 to 13th ed. 1787).

²⁹⁶ Statute of Gloucester, 6 Edw. I, c. 5 (1278). These rules of forfeiture for the tenant's voluntary act would not, however, preclude the possibility of an effective prohibition of involuntary alienation.

²⁹⁷ The Statute of Wales, 12 Edw. I, c. 10 (1284), which, while applicable only to Wales, reflects the English common law of the period, prohibited specific enforcement of covenants against alienation. At this period the term "covenant" was virtually synonymous with the later term "lease," and the action of covenant was that used for the specific enforcement of provisions of leases. *Foresta v. Villy*, Bract. N.B., pl. 1739 (1226); 2 Pollock & Maitland, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 106 (1895).

were void. The American writers and such case law as there is are in accord with this belief.²⁹⁸

As to penalty restraints, it was decided in 1443 that a condition in a lease for years that the lessee not grant his estate was valid and entitled the lessor, upon breach, to enter and so terminate the estate for years.²⁹⁹ The reason given for the validity of such a restraint was the protection it afforded to the reversion. It should be noted that the point was decided at a time when long terms of years were little known, the rights of a lessee for years were still looked upon as primarily contractual and his interest had not yet attained the status of an estate in land. Nevertheless, the decision was followed in a number of cases decided after terms of years had become estates, and terms of five hundred and a thousand years had become common.³⁰⁰ It was later settled that a condi-

²⁹⁸ Gray, *RESTRAINTS ON ALIENATION*, 2d ed., 277 (1895); Schnebly, "Restraints Upon the Alienation of Property," 6 *AMERICAN LAW OF PROPERTY*, §26.51 (1952); Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 *YALE L.J.* 961, 1186 at 1211-1212 (1935). *Accord*: *PROPERTY RESTATEMENT* §405 (1944). Professor Schnebly notes, however, that there are some cases granting specific performance, by way of injunction, of covenants against alienation in leases, e.g., *McEacharn v. Colton* [1902] A.C. 104 (Judicial Committee; decided under the provisions of a peculiar statute in force in South Australia).

²⁹⁹ Anonymous, Y.B. 21 Hen. VI, Hil., pl. 21 (1443), Paston, J., dissenting. At the time of this decision long-term leases were virtually unknown because of the precariousness of the lessee's interest arising from the fact that the lessor could destroy it by suffering a common recovery. 1 Coke, *INSTITUTES* 46a (1628). See *Wind v. Jekyl*, 1 P. Wms. 572, 24 Eng. Rep. 522 at 523 (1719). The Statute of Gloucester, 6 Edw. I, c. 11 (1278), 2 Coke, *INSTITUTES* 321-324 (1641), empowered certain urban lessees to attack such collusive recoveries and Stat. 21 Hen. VIII, c. 15, §3 (1529) made them ineffective as against all lessees for years. Cf. Fratcher, "Defeasance as a Restrictive Device in Michigan," 52 Mich. L. Rev. 505 at 534 (1954).

³⁰⁰ Anonymous, Y.B. 8 Hen. VII, Hil., pl. 3 (1493); Anonymous, 21 Hen. VII, Hil., pl. 12 (1505); Anonymous, 1 Dyer 6b, 73 Eng. Rep. 15 (1537); Anonymous, 1 Dyer 45a, 73 Eng. Rep. 97 (1539); *Earl of Arundel v. Lord Windsor*, 1 Dyer 65a, 73 Eng. Rep. 138 (1549); Anonymous, Moore K.B. 11, pl. 40, 72 Eng. Rep. 405 (1550); *Paschall v. Keterich*, 2 Dyer 151b, 73 Eng. Rep. 330 (1557); Anonymous, 3

tion of forfeiture upon involuntary alienation, as by bankruptcy, was likewise valid.³⁰¹ The cases evidence, however, a tendency to put a very narrow construction upon such conditions, so that no form of alienation is a breach unless clearly penalized by the language of the condition. The validity at common law of a provision in a lease that the term should be forfeited to someone other than the lessor upon alienation by the tenant is not clear because of the undeveloped state of the law of future interests in legal terms for years. If valid at all, such a gift over would have to be limited so as to take effect, if at all, within the period of the common-law Rule Against Perpetuities.³⁰² It would seem that a condition of forfeiture upon alienation in an assignment by a lessee of

Leon. 67, 74 Eng. Rep. 545 (1576); Parry v. Herbert, 4 Leon. 5, 74 Eng. Rep. 688 (1576); Moor v. Farrand, 1 Leon. 3, 74 Eng. Rep. 3 (1587); Sir William More's Case, Cro. Eliz. 26, 78 Eng. Rep. 291 (1583); Stewkley v. Butler, Moore K.B. 880, 72 Eng. Rep. 970, sub nom. Stukeley v. Butler, Hobart 168, 80 Eng. Rep. 316 (1615); Crusoe ex dem. Blencowe v. Bugby, 3 Wils. K.B. 234, 95 Eng. Rep. 1030 (1771); Doe ex dem. Mitchinson v. Carter, 8 T.R. 57, 101 Eng. Rep. 1264 (1798). It is noteworthy that two of these cases held the condition effective to restrain testamentary disposition of the estate. Anonymous, 3 Leon. 67; Parry v. Herbert, *supra*. The clearest statement of the rule and its basis is the dictum in Sir Anthony Mildmay's Case, 6 Co. Rep. 40a at 43a, 77 Eng. Rep. 311 at 317 (1605): "So if a man makes a gift in tail, on condition that he shall not make a lease for his own life, it is void and repugnant; but if a man makes a lease for life or years, on condition that he shall not alien or lease the lands, it is good. For at the common law, lessee for life or years might commit waste, which was *ad exhaereditationem* of the lessor, and therefore there was a confidence betwixt the lessor and lessee, and therefore the lessor might restrain the lessee from aliening or demising to another, in whom perhaps the lessor had not such confidence. And therefore it is reasonable that when he who has the inheritance makes a lease for life or years, that he may restrain such particular tenants from aliening or demising for the benefit of his inheritance."

³⁰¹ Roe ex dem. Hunter v. Galliers, 2 T.R. 133, 100 Eng. Rep. 72 (1787). But an ordinary condition against alienation was not construed to penalize involuntary alienation, Doe ex dem. Mitchinson v. Carter, 8 T.R. 57, 101 Eng. Rep. 1264 (1798).

³⁰² See Simes, FUTURE INTERESTS §199 (1936). Professor Simes thinks that such a special limitation would be valid (§466).

his entire term is void at common law because not imposed for the benefit of a reversion.³⁰³

The American cases follow the English rule that conditions against alienation in leases for years are valid.³⁰⁴ The *Restatement of Property* makes a distinction between leases for years which are executed as commercial transactions and those which are donative in character, such as terms limited in family settlements.³⁰⁵ As to the former, the *Restatement* affirms the validity of penalty restraints, including forfeiture to either the lessor or another, when imposed for the benefit of the lessor and not in violation of the common-law Rule Against Perpetuities. It would permit the assignor of a term to restrain future alienation, even though he retains no reversion, if he remains liable on the covenants of the lease. As to the latter, the *Restatement* would impose the rules which govern restraints on alienation on freehold estates of like duration, treating any lease which is not limited in duration by lives in being as governed by the rules applicable to estates in fee simple.

The Constitution of Michigan provides that "No lease or grant of agricultural land for agricultural purpose for a longer period than 12 years, reserving any rent or serv-

³⁰³ 1 Coke, INSTITUTES 223a; Sweet, "Restraints on Alienation," 33 L.Q. REV. 236, 238 (n. 3), 244 (1917); Gray, RESTRAINTS ON ALIENATION, 2d ed., 90 (1895); Simes, FUTURE INTERESTS §466. Cf. *Doe ex dem. Duke of Norfolk v. Hawke*, 2 East 481, 102 Eng. Rep. 453 (1802).

³⁰⁴ Some are collected in Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.51 (1952); Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 YALE L.J. 961, 1186 at 1211 (1935), and Simes, FUTURE INTERESTS §466 (1936).

³⁰⁵ Sec. 410 (1944). Cf. *Johnston v. Michigan Consolidated Gas Co.*, 337 Mich. 572 at 582, 60 N.W. (2d) 464 (1953), where *Property Restatement*, §489 (1944), making a similar distinction between commercial and donative easements in gross, was quoted with approval.

ice of any kind, shall be valid.”³⁰⁶ Our statutes give estates for years substantially the same incidents which they had at common law and codify the law of future interests in and following estates for years so as to make the rules governing such interests coincide, so far as possible, with the rules which govern like future interests in and following freehold estates.³⁰⁷ The statutes appear to make it clear that a term of years may be so limited as to pass to someone other than the lessor on the happening of a

³⁰⁶ CONST. 1908, Art. XVI, §10. CONST. 1850, Art. 18, §12, provided, “No lease or grant hereafter of agricultural land for a longer period than twelve years, reserving any rent or service of any kind, shall be valid.”

³⁰⁷ Rev. Stat. 1946, c. 62, provided:

“Sec. 5. . . . estates for years shall be denominated chattels real. . . .

“Sec. 20. A contingent remainder shall not be created on a term for years, unless the nature of the contingency upon which it is limited be such that the remainder must vest in interest, during continuance of not more than 2 lives in being at the creation of such remainder, or upon the termination thereof.

“Sec. 21. No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

“Sec. 23. All the provisions in this chapter contained relative to future estates, shall be construed to apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years, shall not be suspended for a longer period than the absolute power of alienation can be suspended, in respect to a fee. [Cf. §15, note 279 *supra*.]

“Sec. 24. Subject to the rules established in the preceding sections of this chapter, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon.

“Sec. 27. A remainder may be limited on a contingency, which in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder shall be construed a conditional limitation and shall have the same effect as such a limitation would have by law.”—Comp. Laws (1857) §§2589, 2604, 2605, 2607, 2608, 2611; Comp. Laws (1871) §§4072, 4087, 4088, 4090, 4091, 4094; How. Stat., §§5521, 5536, 5537, 5539, 5540, 5543; Comp. Laws (1897) §§8787, 8802, 8803, 8805, 8806, 8809; Comp. Laws (1915) §§11523, 11538, 11539, 11541, 11542, 11545; Comp. Laws (1929) §§12925, 12940, 12941, 12943, 12944, 12947; Mich. Stat. Ann. §§26.5, 26.20, 26.21, 26.23, 26.24, 26.27; Comp. Laws (1948) §§554.5, 554.20, 554.21, 554.23, 554.24, 554.27. Sections 20 and 23 were repealed, as to conveyances executed and wills becoming effective after September 23, 1949, by Act 38, P.A. 1949, §2, Mich. Stat. Ann §26.49 (2); Comp. Laws (1948) §554.52.

contingency, provided there is no violation of the common-law Rule Against Perpetuities or other applicable rules of law.³⁰⁸

In *Lee v. Payne*,³⁰⁹ a decision affirming a judgment for the lessor in an action for waste against an assignee of the lessee, the court said,

"A lessee for years may assign his entire interest in the lease and premises, unless restrained by covenant not to assign without leave of the landlord, or he may underlet the whole or a part of the premises, for any less number of years than he himself holds."³¹⁰

*Copland v. Parker*³¹¹ was a proceeding by a lessor to recover possession of the demised premises before the end of the term on the ground the lessees had breached a covenant, "not to transfer this lease without the consent of the party of the first part." The report does not state whether the lease contained an express provision for forfeiture on breach of covenant. The lessee appears to have let part of the premises for the whole of the unexpired term. The court, in an oral opinion, held that there had been only a subletting and that an instruction

³⁰⁸ The repeal in 1949 of Rev. Stat. 1846, c. 62, §23, note 307 *supra*, makes it less clear than it was before that it is possible to create future interests in legal terms of years.

³⁰⁹ 4 Mich. 106 (1856).

³¹⁰ *Id.* at 117. In *Craig v. Crossman*, 209 Mich. 462, 177 N.W. 400 (1920), the court rejected a contention that a lease without provision against assignment was inalienable, saying that it was "by nature, assignable." In *Patterson v. Butterfield*, 244 Mich. 330, 221 N.W. 293 (1928), the court, in answer to an argument that an obligation resting upon the lessee in a 99-year lease to erect a building precluded his subleasing, said (at 338), "In the absence of statutory or contractual restrictions, a lessee for years may assign or sublet his leasehold interest without the lessor's consent or an express provision in the lease giving him such right. . . ."

³¹¹ 4 Mich. 660 (1857). The plaintiff was represented by James V. Campbell, later Chief Justice of Michigan and Dean of the University of Michigan Law School. He contended that there had been an assignment. Counsel on both sides assumed the validity of the covenant and cited English cases as to its proper construction.

by the trial court that the covenant extended to both assignment and subletting, was erroneous.

*Harlow v. Lake Superior Iron Company*³¹² was an action of ejectment for mining land. The plaintiff claimed under a 99-year lease of an undivided half of the mining rights given by the owner of the fee to one Graveraet, who assigned his interest to the plaintiff and another. The lease contained no provision against assignment by the lessee and expressly conferred rights on his assigns. The court affirmed a judgment for the defendant on the ground the lease conveyed only an incorporeal interest which could not be enforced in ejectment and said that, while the lessee in such a lease may assign the whole to a single individual or corporation, he may not, because of the nature of the interest, assign undivided interests to several persons.

*Randall v. Chubb*³¹³ was a summary proceeding for possession of land. The plaintiff leased the land to Stoddard by an instrument which did not expressly restrain assignment, but which obligated the lessee to work the farm, using the lessor's implements but providing his own seed, and to deliver a third of the crops to the lessor. Stoddard assigned his interest to the defendant. The court affirmed a judgment for the plaintiff, saying that such a lease is personal and nonassignable, and that an attempt to assign forfeits the lessee's estate.

³¹² 36 Mich. 105 (1877). It is generally held that a profit à prendre in gross may not be assigned in parts to different persons, so that each assignee may exercise it separately, but that it may be assigned to several persons for exercise in common. *Earl of Huntington v. Lord Mountjoy*, Moore K.B. 174, 72 Eng. Rep. 513; 1 Coke, INSTITUTES 164b (1583); 3 Tiffany, LAW OF REAL PROPERTY, 3d ed., §847 (1939).

³¹³ 46 Mich. 311, 9 N.W. 429 (1881). *Accord*: *Lewis v. Sheldon*, 103 Mich. 102, 61 N.W. 269 (1894). *Cf.* *Gravenburgh v. McKeough*, 117 Mich. 555, 76 N.W. 77 (1898); *Vincent v. Crane*, 134 Mich. 700, 97 N.W. 34 (1903); *Lowe v. Radecke*, 204 Mich. 646, 171 N.W. 408 (1919).

Leduke v. Barnett ³¹⁴ was a summary proceeding for possession of land. The plaintiff demised the premises to Sachen by a lease providing that the lessee should not release or assign the lease without the lessor's consent, and that in case of default in performance of any of the covenants the lessor might re-enter. The lessee gave the defendant permission to use one room for thirty days. The court affirmed a judgment for the defendant on the ground the plaintiff had failed to prove that the underletting was without his consent. Although assuming the validity of the condition, the court doubted whether there had been a breach, suggesting that a mere license was not a release or assignment.

Walsh v. Martin ³¹⁵ was an action of assumpsit for use and occupation. The plaintiff leased to Shatto for three years from 1877, the lessee covenanting not to assign or release without the written consent of the lessor and the lessor to be entitled to re-enter on breach of covenant. In 1879 the parties indorsed on the lease an extension to 1884, "without altering the conditions thereof." In 1881, in consideration of the lessee's agreement to make improvements, the lessor endorsed on the lease, "I hereby give Shatto the privilege of occupying the store mentioned in this lease for ten years from 1884, the rent to be the same as at present." In 1886 Shatto assigned the lease to the defendant, whereupon the plaintiff attempted to raise the rent. The court assumed the validity of the covenant against assignment in the original lease but reversed a judgment for the plaintiff on the ground the 1881 endorsement was a new lease, to begin *in futuro*, without any provision against alienation, so that the assignment was effective against the lessor.

³¹⁴ 47 Mich. 158, 10 N.W. 182 (1881).

³¹⁵ 69 Mich. 29, 37 N.W. 40 (1888).

Wertheimer v. Hosmer ³¹⁶ was a proceeding in mandamus to compel dissolution of an injunction. Clark and Lane leased a store to Michell for four years, to be used for the sale of teas, coffees, spices, and similar goods, the lease providing that Michell should not sublet or permit the occupancy by any other party, without the written consent of the lessors. The report does not indicate whether the lease provided expressly for re-entry on breach of covenant. Michell, with the oral consent of the lessors, sublet the store to Sprague, to be used for the sale of musical instruments and sheet music. Sprague assigned his interest to William and Max Wertheimer, who began altering the premises for use as a "misfit-clothing house." Clark and Lane then sued Michell, Sprague, and the Wertheimers in equity and procured *ex parte* an injunction restraining Michell and Sprague from using the premises for any purpose except the sale of teas, coffee, spices, similar goods and musical instruments and restraining the Wertheimers from using or occupying the store or any part thereof. The court declined to interfere with this injunction by mandamus. As to the contention of the defendants that the permission to sublet to Sprague terminated the provision against assignment, the court said,

"A covenant not to assign or underlet the leased premises without the assent of the lessor is frequently inserted in a lease, and is regarded as a fair and reasonable covenant. But a license once given removes the restriction forever, as the condition is treated as entire, and therefore not capable of being waived or released as to part; but in order to have that effect it must be such a license as is contemplated in the lease,—that is, if the lease provides that the license shall be in writing, an oral license

³¹⁶ 83 Mich. 56, 47 N.W. 47 (1890).

is not good. It is not to be understood, however, that this written stipulation not to sublet unless by consent of the lessor, in writing, may not be waived by an oral agreement; The agreement to waive the condition as to Sprague, however, was not a waiver of the condition in the lease as to other parties,”³¹⁷

If the injunction in this case had been limited to enforcement of the use restriction, there could be no doubt of the soundness of the result. The injunction went farther, however, in that it restrained the assignees from occupying the premises for any purpose, despite the fact that the lessors had not elected to declare a forfeiture of the lease and had indicated their intention of holding the original lessee liable for rent. The effect of such specific performance of a covenant against alienation is to make it effective as a prohibition on alienation, forcing the lessee to remain such against his will. Enforcement of such a prohibition may have seriously undesirable results which mere forfeiture would not. Although an effective assignment of his lease does not ordinarily free the lessee from liability to the lessor for performance of its covenants, it does free him from other types of liability. The owner of a legal possessory estate in land is commonly personally liable to the state and its subdivisions for property taxes, bound to perform labor on the roads, criminally responsible for removal of snow and noxious weeds, and liable in tort to members of the

³¹⁷ *Id.* at 61. At common law a *condition* against assignment without the permission of the lessor was destroyed by the giving of permission for a single assignment; that is, the lessor had no right of entry if the assignee assigned without permission. *Dumper's Case*, 4 Co. Rep. 119b, 76 Eng. Rep. 1110 (1603); see *Anonymous*, 1 Dyer 45a, 73 Eng. Rep. 97 (1539); *Fox v. Whitchocke*, 2 Bulst. 290, 80 Eng. Rep. 1129 (1614). It would seem, however, that a *covenant* against assignment without the permission of the lessor may, by apt words, be made to run with the land, so that when an assignment is made with permission, the first assignee will be liable in damages for breach of covenant if he reassigns without permission. *Williams v. Earle*, L.R. 3 Q.B. 739 (1868).

public for non-repair of buildings. A tenant whose health or business has failed may be able to escape pecuniary liability to his lessor by forfeiture of his estate or bankruptcy, but if he is forced by injunction to retain the estate against his will he cannot escape these public obligations. The effect of such an injunction in connection with a long-term lease may be to reduce the tenant to a status of serfdom or peonage in which he is bound to the land and from which he can escape only by death.³¹⁸

*Sommers v. Reynolds*³¹⁹ was a summary proceeding for possession of a hall. The plaintiff demised the hall to the trustees of the Royal Adelphia Godfrey Conclave No. 131 by a lease which provided that the lessees should not release, assign, or sublet, except for society purposes, without the written consent of the lessor, and that the lessor might re-enter upon breach. The Royal Adelphia and Godfrey Conclave were dissolved, and twelve members of the latter formed a Godfrey Club, which sublet the hall five nights a week to other societies. A judgment for the defendants was affirmed on the ground the covenant was not breached by the dissolution or subletting.

*Darmstaetter v. Hoffman*³²⁰ was an action of assumpsit

³¹⁸ See note 298 *supra*. If the doctrine of *Wertheimer v. Hosmer* should be extended so as to compel the lessee's next of kin, taking on intestacy, to retain the estate, it might permit the creation of a system of perpetual, hereditary serfdom, without the ameliorating customs which eased the lot of the mediaeval peasant. One may speculate as to whether the lessee's great-grandson could break his bond to the land by escape and hiding for a year and a day.

³¹⁹ 103 Mich. 307, 61 N.W. 501 (1894). Cf. *Struble v. Community Club*, 218 Mich. 604, 188 N.W. 292 (1922).

³²⁰ 120 Mich. 48, 78 N.W. 1014 (1899). In *Smith v. Applebaum*, 241 Mich. 493, 217 N.W. 401 (1928), a 99-year lease provided that the lessee might "not sell or assign this lease and be released from liability thereon" without providing a bond to secure performance of the covenants. The lessee assigned the lease without providing a bond. After accepting payments of rent from the assignee, the lessor sued the original lessee for rent which accrued later. The court affirmed a judg-

for rent. Hubbard and King leased a saloon to the plaintiffs, who covenanted to pay the rent and not to assign or transfer the lease without the written consent of the lessors. Without obtaining the consent of the lessors, the plaintiffs assigned the lease to Kudner, and Kudner assigned to the defendant. The plaintiffs sued for rent which they had not paid to Hubbard and King. A judgment for them was affirmed, the court saying that when a lease is properly assigned, the assignee is bound to pay the rent directly to the lessor, and the assignor cannot hold the assignee for rent unless he has first paid it to the lessor. The opinion states that where, however, there is a covenant against assignment which the lessor has not waived, the assignee is the assignor's tenant and liable to him rather than the assignor. The theory of this decision is that the original lessee could not divest himself of his estate without the consent of the lessor. If this is so, then a covenant against assignment is effective as a prohibition on alienation or disabling restraint which forces the lessee to remain such against his will. The unsoundness and undesirability of such a view have already been made manifest.

*Marvin v. Hartz*³²¹ was a summary proceeding for possession of land. The plaintiff demised to Berlin, the lessee covenanting not to assign, transfer, or sublet with-

ment for the lessor, saying that acceptance of rent "would not establish the fact that the realty company had been substituted as lessee in the place of the defendant," and that the assignment "in no way changed the relation of the parties." The result reached is sound, because an assignment does not relieve a lessee from performance of a covenant to pay rent in the absence of novation. The quoted language is unfortunate, however, in suggesting that an assignment without permission has no effect at all. Unless effective prohibitions on alienation are possible, such an assignment does destroy privity of estate and liability based thereon. Cf. *Mooradian v. Petroff*, 254 Mich. 278, 236 N.W. 780 (1931); *Buhl Land Co. v. Franklin Co.*, 258 Mich. 377, 242 N.W. 772 (1932).

³²¹ 130 Mich. 26, 89 N.W. 557 (1902).

out the written assent of the lessor, and the lease providing that the lessor might re-enter upon breach of covenant. Berlin assigned to the defendant without the consent of the lessor. A judgment for the defendant based on a directed verdict was reversed. This appears to be the only Michigan case in which a condition of forfeiture on alienation in a lease for years was enforced according to its terms.

*Crouse v. Michell*³²² was a suit to foreclose a lien on an estate for years. Parker leased land to Michell for a term of fifteen years, the lease providing that the lessee should not assign, transfer, or sublet without the written consent of the lessor, and that the lessor might re-enter on breach of covenant. Michell, without the consent or knowledge of the lessor, assigned the lease to the plaintiffs as security for a debt. Later, Michell, with the written consent of the lessor, assigned the lease to Ives and Sons, who did not know of the prior assignment. Counsel for the defense contended that a court of equity should not enforce an assignment of a lease made in violation of its covenants, even against parties other than the lessor. The court, without deciding whether this contention is correct, affirmed a decree for the plaintiffs on the ground that a mortgage of an estate for years or assignment for security is not a breach of a covenant against assignment. The opinion contains language to the effect that covenants against assignment of leases are not favored and will be strictly construed.

*Negaunee Iron Company v. Iron Cliffs Company*³²³ was a suit to quiet title. In 1857, when the lessee had a two-stack furnace on nearby land, Harvey, in consideration of a lump sum of \$25,000, leased 646 acres to the

³²² 130 Mich. 347, 90 N.W. 32 (1902).

³²³ 134 Mich. 264, 96 N.W. 468 (1903).

Pioneer Iron Company for 99 years for the purpose of mining and quarrying ores and marble. The lease, which did not reserve rent, read,

“Provided, it shall not quarry, mine, or remove any ores on said land except such as it shall actually convert into merchantable iron in its own furnaces or forges The rights and easements above mentioned shall descend to the corporate successors of the party of the second part, but not to its assigns.”

In 1866 the Pioneer Iron Company leased all its lands to the defendant Iron Cliffs Company, which soon after acquired the entire capital stock of the Pioneer Company. The charter of the Pioneer Company expired in 1887 but was revived in 1889 under constitutional and statutory provisions adopted in the latter year. The furnace was dismantled in 1894. The plaintiffs acquired the reversion and used the land from 1870 to 1900, when the revived Pioneer Iron Company asserted a right to mine under the 1857 lease. The court affirmed a decree for the plaintiffs on the ground the lease conveyed only an incorporeal right which was appurtenant to the furnace and was extinguished by the dismantling of the furnace. Having reached a decision on this ground, the court declined to consider the validity or effect of the provision that the lease should not “descend” to assigns of the lessee. That provision might be construed as either a prohibition on alienation or a limitation intended to make the estate cease on alienation. The court agreed, in general, with a contention of the defendants that a court of equity should not enforce provisions for forfeiture in a lease, but should leave the lessor to his remedy at law. It pointed out, however, that in this case the reversioners had already effected a forfeiture by re-entry and occupation for thirty years, so that all equity

was being requested to do was to enjoin threatened trespasses.

*Wray-Austin Machinery Company v. Flower*³²⁴ was a suit for subrogation to the rights of the lessee under a lease. Flower leased to Wray by an instrument which contained a covenant against assignment but not against subletting and an express provision for forfeiture on breach. Wray sublet to the plaintiff for the balance of the term. Wray having defaulted in payment of rent, Flower served him with a notice to quit, commenced a summary proceeding for possession before a circuit court commissioner, and took judgment by default. The statute then in force provided that no writ of restitution should issue on such a judgment if the defendant paid the rent due and double the costs within five days after entry of judgment.³²⁵ The day after the judgment was entered the plaintiff learned of it and paid the commissioner the rent due and the exact amount of the costs. Flower refused to accept this money and commenced proceedings in mandamus to compel issuance of a writ of restitution. The plaintiff then sued Wray and Flower in equity, claiming that it was equitably entitled to an assignment of the lease and to be subrogated to Wray's statutory right of redemption. The court reversed a decree for the plaintiff, holding that, as against the lessor,

³²⁴ 140 Mich. 452, 103 N.W. 873 (1905). In *Ladas v. Psiharis*, 241 Mich. 101, 216 N.W. 458 (1927), a lease had been assigned to a partnership with the consent of the lessor. The lessor secretly gave one of the partners a renewal lease containing a covenant against assignment without the consent of the lessor. It was held that the other partners were entitled to share in the lease, not only as against the lessee but as against the lessor who, under these circumstances, could be compelled to assent to an assignment to the firm.

³²⁵ Rev. Stat. 1846, c. 123, §26, as amended, Comp. Laws (1897) §11177. The present statute omits the word "double." Act §14, P.A. 1915, c. 30, §25, as amended; Comp. Laws (1915) §13253; Comp. Laws 1929, §14988; Mich. Stat. Ann. §27.1999; Comp. Laws (1948) §630.25.

the plaintiff could not assert a right to an assignment of the lease, because such an assignment would entitle the lessor to a forfeiture of the estate. As the plaintiff had not tendered the full amount required by the statute, the court thought it unnecessary to decide whether a subtenant, as such, could exercise the lessee's statutory right of redemption.

Hilsendegen v. Hartz Clothing Company ³²⁶ was a summary proceeding for possession of parts of a store building. The plaintiff demised three connected stores and a basement to Hartz by a lease containing a covenant against assigning or subletting without the written consent of the lessor, which was modified by a provision that,

"Permission is hereby given second party to sublet portions or departments of said store for the same line of business, also the basement for any unobjectionable business, other than for saloon, restaurant, pawnshop and jewelry business."

When the lease was made, Hartz was operating a clothing business in two of the stores and subletting the third to persons running a hat hospital and tailor shop. Hartz later organized the defendant clothing company and sublet the first two stores to it, excepting a space measuring fifteen by twenty feet in one corner. The court reversed a judgment for the plaintiff, holding that there had been no breach of the covenant and saying that provisions involving forfeiture are not favored and should be construed most strongly against the lessor.

Hammond v. Hibler ³²⁷ was a suit for an injunction against sale of liquor. The plaintiffs leased land to

³²⁶ 160 Mich. 255, 130 N.W. 646 (1911). The lease contained an express provision for re-entry on breach of covenant.

³²⁷ 168 Mich. 66, 133 N.W. 932 (1911). The lease contained an express provision for re-entry on breach of covenant.

Hinkle and Nolin for ten years, the lease providing "that no building or part thereof be sublet for or used as a saloon, or that the sale of intoxicating liquors of any form be permitted on said premises." Hinkle and Nolin assigned the lease to a corporation which sublet part of the premises to Harrington. The plaintiffs, in consideration of his paying them \$100 a month, gave written permission for sale of liquor to Harrington "but not to his heirs, assigns, executors or administrators." A judgment creditor of Harrington levied on his leasehold interest, bought at the sale, and assigned the sublease to the defendant. A decree for the plaintiffs was affirmed by a majority of four justices on the ground the permission given Harrington was inalienable. Three justices dissented, relying on the statement in the opinion in *Wertheimer v. Hosmer*, quoted above,³²⁸ that a condition against alienation is entire, cannot be waived in part, and is removed *in toto* by any waiver. One justice did not sit. The majority opinion is probably sound. What was waived was not the covenant against alienation but the use restriction and that by a license to Harrington which would be personal and nonassignable even without express provision to that effect. Unlike *Wertheimer v. Hosmer*, the decree in this case did not enforce a covenant against alienation as a prohibition compelling a lessee to retain his estate against his will.

*Flynn v. Bachner*³²⁹ was a summary proceeding for possession of land. Plaintiff leased a store to defendants,

³²⁸ Notes 316 and 317 *supra*. The dissenting justices were concerned by the fact that the plaintiffs were willing to give the defendant permission to sell liquor for a substantial consideration. Curiously, in view of its theory, the dissenting opinion would have conditioned a decree for the defendant on his paying the \$100 a month which Harrington agreed to pay for his license.

³²⁹ 168 Mich. 424, 134 N.W. 451 (1912). The lease contained an express provision for re-entry on breach of covenant.

"for the term of three years . . . with the privilege of two years more at the expiration of said first three years, making, if said privilege of two years more is exercised, a total of five years, . . . to be occupied for a glove store Said parties of the second part further covenant that they will not assign nor transfer this lease, but can sublet if the business is satisfactory to the party of the first part."

The defendants, with the plaintiff's oral permission, sublet part of the store to Darr for the manufacture and sale of belts. Defendants elected to extend the lease for the additional two years. After the first three years had passed the plaintiff brought this proceeding on the theory that the permission to sublet expired at the end of that period. A judgment for the defendants was affirmed on the ground the lease was for five years at the option of the lessee and the permission was coextensive with the lease.

*Patterson v. Carrel*³³⁰ was a summary proceeding for possession of land. Mars leased the premises to Castner, who covenanted not to sublet without the written assent of the lessor. The lease contained an express provision for re-entry on breach of covenant. The defendant purchased Castner's business, took possession of the premises without formal assignment of the lease, and made repairs. Mars accepted rent from the defendant and made no objection to the repairs. Mars conveyed the reversion to the plaintiffs. A judgment for the defendant was affirmed on the ground that, if there was any breach of the

³³⁰ 171 Mich. 296, 137 N.W. 158 (1912). *Accord*: *Pearson v. Sullivan*, 209 Mich. 306, 176 N.W. 597 (1920). Acceptance of rent from the head lessee, with knowledge that he had sublet, was held to waive the breach in *Struble v. Community Club*, 218 Mich. 604, 188 N.W. 292 (1922). *Cf.* *Weber v. Van Blerck Motor Co.*, 186 Mich. 449, 152 N.W. 1036 (1915).

covenant against subletting, it was waived by Mars, and the waiver bound his transferees.

*Great Lakes Realty and Building Company v. Turner*³³¹ was a suit to restrain forfeiture of a lease. The defendant demised land to Brown for 99 years by a lease in which the lessee covenanted to erect a building and not to assign, except by way of mortgage, until the building was completed. Express permission to release or sublet at any time was granted in the lease. Brown sublet the entire tract to the plaintiff for a term of fifty years and, by a separate instrument executed on the same day, contracted to assign the head lease to the plaintiff when the building was erected. The court affirmed an order overruling a demurrer to the bill of complaint, holding that a contract to assign is not a breach of a covenant against assignment. The case is significant in that it assumes the validity of a condition against assignment in a lease for a term longer than twenty-one years. The building was to be erected in ten years, however, so the restraint on alienation was not coextensive in duration with the lease itself.

*McDonald v. Andrews*³³² was a suit for specific performance of an option. The defendants leased land to the plaintiff for five years, with an option to purchase. The lease contained a covenant against assigning or subletting without the written assent of the lessors. The lease was not executed with the formalities required for recording and, to obtain a recordable instrument, the plaintiff assigned the lease to his sister, who quit-claimed back without taking possession. A decree for the plain-

³³¹ 190 Mich. 582, 157 N.W. 57 (1916). The lease contained an express provision for re-entry on breach of covenant.

³³² 199 Mich. 160, 165 N.W. 797 (1917). The lease contained an express provision for re-entry on breach of covenant.

tiff was affirmed on the ground an assignment without transfer of possession is not a breach of a covenant against assignment. This seems a sound application of the ancient common-law rule that restraints on alienation are enforced only to protect a reversioner or remainderman against waste.

*Miller v. Pond*³³³ was a summary proceeding for possession of land. Sarah Burr leased to "Ische Bros., Will C. Ische and Chas. E. Ische, copartners" for five years, with the privilege of a five year extension. The lease contained a covenant not to assign, transfer, or sublet in whole or part without the written assent of the lessor and an express provision for re-entry on breach of covenant. The plaintiff purchased the reversion. The Isches sold Pond a two-thirds interest in their business and admitted him into their partnership. A judgment for the defendants was affirmed on the ground that adding a partner to a lessee firm is not a breach of a covenant against assignment. The court said that the words "in whole or part" applied only to subletting.

*G. J. Netting Company v. Sillman*³³⁴ was a suit to restrain summary proceedings for possession of land. The Sillmans leased land to the Chinese-American Realty Company for fifty years by an instrument which provided,

"Said lessee shall not sell or assign this lease without the consent of the lessors in writing If this lease shall by operation of law devolve upon or pass to any person or persons other than said lessee (the foregoing being hereinafter referred to as events of defeasance),

³³³ 214 Mich. 186, 183 N.W. 24 (1921). Cf. *Tierney v. McKay*, 232 Mich. 609, 206 N.W. 325 (1925), where the withdrawal of one of two partners from the lessee firm was held not to be a breach of a similar covenant.

³³⁴ 226 Mich. 307, 197 N.W. 545 (1924).

then the lessors may elect to declare the terms of this lease ended and exercise the right of reentry and re-possession herein elsewhere conferred in case of default."

The lessee erected a valuable building and mortgaged it for \$75,000 to the Peninsular State Bank. The plaintiff levied on the leasehold under a judgment against the lessee and bought at execution sale. The lessors commenced summary proceedings to enforce a forfeiture, and the plaintiff started this suit, asserting equity jurisdiction on the ground, *inter alia*, that the condition was ambiguous. The court reversed an order denying a motion to dismiss, saying that the condition was not ambiguous and that the only question was as to its validity, which could be determined at law. The opinion gives no intimation of the court's view as to the validity of a condition against involuntary alienation except to suggest, indirectly, that it depends upon whether the statute permitting sale of estates for years on execution ³³⁵ confers upon such estates an inseparable incident which cannot be restrained by condition.

McPheeters v. Birkholz ³³⁶ was an action of trespass on the case for wrongful eviction. The defendants leased a farm to the plaintiff on shares for a year from June, 1917. The plaintiff left on September 15, to be with his wife in another state during her confinement, leaving a hired man in charge of the farm. A few days later the defendants seized possession of the farm by force. The court affirmed a judgment for the plaintiff for triple

³³⁵ "Leasehold interests in lands shall be subject to levy and sale upon execution. Proceedings to and including the sale shall be the same in all respects as in the case of real estate sold on execution." Act 314, P.A. 1915, c. 23, §141; Comp. Laws (1915) §12956; Comp. Laws (1929) §14676; Mich. Stat. Ann. §27.1640; Comp. Laws (1948) §623.141.

³³⁶ 232 Mich. 370, 206 N.W. 196 (1925).

damages under the statute of forcible entry and detainer,³³⁷ saying that, although a lease on shares implies a covenant that the lessee will give the farm his personal attention, there was no breach in this instance and, even if there had been a breach, it would not have entitled the lessors to declare a forfeiture in the absence of an express provision therefor in the lease. The opinion states that, in general, breach of a covenant in a lease does not work a forfeiture in the absence of a provision for re-entry but suggests that there may be an exception to that rule in the case of covenants against alienation.³³⁸

*Webb v. Knauss*³³⁹ was a summary proceeding for possession of land. The plaintiff demised land to Unger for 99 years by a lease containing a covenant against assignment without the written consent of the lessor and a provision permitting the lessee to sublet in whole or in part without such consent. Unger assigned to Knauss with the written permission of the lessor. Knauss died, and his widow succeeded to his interest. Mrs. Knauss, by an instrument purporting to be a sublease, transferred the whole of the unexpired term to the Houghtens. The Houghtens assigned to Flint. After learning of these assignments the plaintiff commenced a summary proceeding for possession for nonpayment of rent against Mrs. Knauss, the Houghtens, and Flint, and took a judgment against all of them, which was paid by Mrs. Knauss. The

³³⁷ Act 314, P.A. 1915, c. 33, §19; Comp. Laws (1915) §13376; Comp. Laws (1929) §15113; Mich. Stat. Ann. §27.2130; Comp. Laws (1948) §633.19; reenacting Rev. Stat. 1846, c. 111, §3; Comp. Laws (1857) §4717; Comp. Laws (1871) §6372; How. Stat., §7957; Comp. Laws (1897) §11206.

³³⁸ 232 Mich. 377, 205 N.W. 199, citing *Wray-Austin Machinery Co. v. Flower*, 140 Mich. 452, 103 N.W. 873 (1905), note 324 *supra*.

³³⁹ 253 Mich. 197, 234 N.W. 154 (1931). The lease contained an express provision for re-entry on breach of condition. The estate for years passed to Mrs. Knauss by will.

plaintiff then commenced a summary proceeding for possession against the same defendants on the ground the purported sublease from Mrs. Knauss to the Houghtens was an assignment and worked a forfeiture. The defendants contended that the permission to assign to Knauss destroyed the whole covenant against assignment ³⁴⁰ and that, even if it did not, the lessor's taking a judgment for rent against the assignees waived the breach. The court held that the purported sublease was an assignment but affirmed a judgment for the defendants on the second ground urged by them, without discussing the first. The case is significant in that it assumes the validity of a restraint on alienation in a 99-year lease which is operative for the full term of the lease.

The Michigan decisions clearly affirm the validity of a provision in a commercial lease for forfeiture to the lessor on alienation by the lessee. There is nothing in them to indicate that the rule is otherwise in the case of a provision intended to be operative for the full period of a lease for a very long term, such as a thousand years or 99 years renewable forever. There are no Michigan decisions on restraints on alienation of noncommercial leasehold interests, and there is nothing to suggest that the rule governing them is any different from that which applies to like restraints in commercial leases.³⁴¹ No Michigan case deals with a provision for forfeiture to someone other than the lessor, but such a provision is probably valid.³⁴²

Three Michigan decisions suggest that a covenant against alienation in a lease for years is, or may be made

³⁴⁰ As to this contention, see the language in *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N.W. 47 (1890), quoted at note 317 *supra*.

³⁴¹ Cf. PROPERTY RESTATEMENT §410 (1944), note 305 *supra*.

³⁴² Rev. Stat. 1846, c. 62, §27, note 307 *supra*.

through specific performance by injunction to operate as, a prohibition on alienation which disables the lessee from transferring his estate and forces him to retain it, with all its burdens and public obligations, against his will.³⁴³ If this is so, the law of Michigan on this point is out of harmony with that of England and the great majority of jurisdictions in this country.³⁴⁴ It does not appear that the Michigan Supreme Court was fully aware when it rendered these decisions of their inconsistency with the principles of the common law as those principles have stood since the abolition of perpetually unbarrable entails in 1472. It is to be hoped that the court will overrule those three decisions and replace them with the sound rule of *Mandlebaum v. McDonell*³⁴⁵ that all prohibitory restraints on alienation of legal estates in land are void.

Public policy is no explanation of why every restraint on alienation of an estate in fee simple, even if limited in duration to a single day, is absolutely void, whereas restraints on alienation of estates for years are fully valid, although general in scope and extending for the full duration of the term, and although the term may be for a thousand years or more. The reversioner under a short term lease has a real interest in the integrity and good husbandry of his tenant; the reversioner under a thousand year lease, particularly if no rent is reserved, has no substantial interest in his tenant's character or behavior; a restraint on alienation for his benefit means merely that he may impose a pecuniary mulct on the tenant as

³⁴³ *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N.W. 47 (1890); *Darmstaetter v. Hoffman*, 120 Mich. 48, 78 N.W. 1014 (1899); *Smith v. Applebaum*, 241 Mich. 493, 217 N.W. 401 (1928).

³⁴⁴ Notes 297 and 298 *supra*.

³⁴⁵ 29 Mich. 78 (1874), note 138 *supra*. Accord with the rule proposed by the text: PROPERTY RESTATEMENT §405 (1944).

a condition of assenting to a transfer. This was the practice of feudal overlords of tenants in fee simple until it was stopped by the enactment of the statute *Quia Emptores Terrarum*.³⁴⁶ Restraints on estates for long terms of years are as objectionable as those upon estates in fee simple. If the restraint extends to involuntary alienation, the impediment to creditors is manifest. Moreover, such restraints impede the economic utilization of land to its full capacity. An industrial concern may be financially unable to move its operations to a new and more suitable location if it cannot transfer its existing plant to another concern without paying a lessor a prohibitive fee. When land under a long term lease should have a new building and the lessee cannot finance construction without assigning or encumbering his estate, if the lessor insists upon the full anticipated gain from the venture as a condition of his assent, no building is likely to be built. Such restraints may also impede maximum utilization of human capacities by restricting mobility. For example, a professional man whose chief asset is a rent-free long-term lease of a house, subject to forfeiture on alienation, is financially bound to exercise his talents in the vicinity of the house although they might develop more fully and be of greater social utility in some other locality.³⁴⁷ It is probable that general restraints on alienation of long-term leases will be used to evade the recent United States Supreme Court decisions prohibiting the enforcement of use restrictions against occupancy by members of a particular race.³⁴⁸

³⁴⁶ Statute of Westminster III, 18 Edw. I, stat. 1 (1290). See notes 7, 104 *supra*.

³⁴⁷ This is especially true of clergymen and university professors whose social value is high but whose incomes are so low that the availability of a free house is likely to be decisive as to their location. See note 318 *supra*.

³⁴⁸ *McGhee v. Sipes*, 334 U.S. 1 (1948), reversing *Sipes v. McGhee*, 316 Mich. 614, 25 N.W. (2d) 638 (1947).

It may be that we need a new statute *Quia Emptores Terrarum* to prohibit restraints on alienation of estates for years which are imposed for undesirably long periods.³⁴⁹ Extension of the existing constitutional prohibition on long-term leases of agricultural land³⁵⁰ to all types of leases would accomplish the purpose but might interfere unduly with flexibility in conveyancing. Perhaps a statute providing that no restraint on alienation in a lease should be valid for more than twenty-one years after its execution would be desirable.

³⁴⁹ Professor Gray suggested the need for legislation on the subject. *RESTRAINTS ON ALIENATION*, 2d ed., 90 (1895).

³⁵⁰ Note 306 *supra*. It should be noted that the prohibition has no application to a lease which does not reserve rent or services. Hence the constitutional provision fails to regulate noncommercial leases, the type which, as the *Restatement of Property* recognizes, are most likely to be used to set up objectionable perpetuities.

Expectant Legal Interests in Land

THE common law recognized a number of interests in land which were not presently possessory but would or might become so. These included the interest of an owner of a freehold estate who had leased the land for a term of years, the interest of the owner of an estate for years who had sublet for a lesser term, and the interest of an owner of a freehold estate who had conveyed a lesser freehold estate. These interests were all known as reversions, but their incidents differed because the reversioner of the first type had seisin, whereas those of the other two types did not. From the end of the thirteenth century, the common law recognized the remainder, an estate limited in a conveyance to commence in possession upon the termination of a prior estate in tail, for life or for years created by the same conveyance.³⁵¹ The validity of contingent remainders was not recognized until the fifteenth century and then only when preceded by an estate of freehold.³⁵² From a very early period the law recognized the *interesse termini*, the interest of the owner of an estate for years which is to commence in the future.³⁵³ The reversion, the remainder, and the *interesse*

³⁵¹ *Fitz William v. Anonymous*, R.S.Y.B. 33 Edw. I, 20 (1305).

³⁵² Sir Thomas Littleton seems to have considered contingent remainders invalid. *TENURES*, §721 (1481). *Butler v. Bray*, 2 Dyer 189b at 190b, 73 Eng. Rep. 418 at 420 (1560); *Chudleigh's Case*, 1 Co. Rep. 120a at 130a, 134b, 76 Eng. Rep. 270 at 296, 304 (1589-95); *Goodright v. Cornish*, 1 Salk. 226, 91 Eng. Rep. 200 (1694); 3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 134-137 (1923); 7 *id.* 85 (1926).

³⁵³ 1 Coke, *INSTITUTES* 45b, 46b. Strictly speaking, the *interesse termini* was not an estate, but it was much more than a mere possibility or right of entry or action. *Saffyn's Case*, 5 Co. Rep. 123b at

termini were the only estates in expectancy known to the common law, but it also recognized certain other interests in expectancy which did not rise to the dignity of estates. These included the right of entry or of action of the disseised or dispossessed owner of a possessory estate, the right of action of a reversioner or remainderman whose estate had been discontinued by the tortious operation of a conveyance made by the owner of the possessory estate, the right of entry retained by one who conveyed an estate subject to a condition subsequent, inchoate dower, and unassigned dower consummate. Whether the common law recognized the possibility of reverter, which is the interest, if any there can be, retained by one who has conveyed a determinable estate which is not on condition subsequent, is not clear.³⁵⁴ The Statutes of Uses and Wills added four types of estates in expectancy, the springing use, the shifting use, the springing executory devise, and the shifting executory devise.³⁵⁵

124b, 77 Eng. Rep. 248 at 250 (1605); 7 Holdsworth, HISTORY OF ENGLISH LAW 247 (1923); Bordwell, "Interests in Chattels Real and Personal," 1 Mo. L. Rev. 119 at 133-137 (1936).

³⁵⁴ E.g., the interest retained by *A* after conveying "to *B* and his heirs so long as the Penobscot Building shall stand." Challis, LAW OF REAL PROPERTY, 3d ed., 263-268, 437-439 (1911); Gray, RULE AGAINST PERPETUITIES, 3d ed., 24-44, 579-587 (1915). Professor Gray thought that the possibility of reverter was a form of reversion and that the statute *Quia Emptores Terrarum* prohibited the retention of any type of reversion on a conveyance in fee simple. Unfortunately, the courts in this country have not always been careful to distinguish, on the one hand, between the possibility of reverter and the right of entry for breach of condition subsequent, both of which are reversionary possibilities created according to the rules of the common law unmodified by statute, and, on the other hand, between these reversionary possibilities and the shifting use limited in favor of the grantor, operating under the Statute of Uses, which is not a reversionary possibility but a future estate. As to such shifting uses, see Digby, HISTORY OF THE LAW OF REAL PROPERTY, 4th ed., 354-356 (1892).

³⁵⁵ Brooke, GRAUNDE ABRIDGEMENT, "Feffements al Uses," pl. 30, 50 (1573); Digby, HISTORY OF THE LAW OF REAL PROPERTY, 4th ed., 357-359 (1892); 4 Holdsworth, HISTORY OF ENGLISH LAW 440, 474 (1924); PROPERTY RESTATEMENT, Introductory Note to Div. III (1936).

Reversions of all three types³⁵⁶ and *interessia termini*³⁵⁷ were, from an early period, as freely alienable inter vivos as like possessory estates. There is doubt as to the alienability of remainders at the early common law, but it was settled by the sixteenth century that vested remainders were transferable inter vivos.³⁵⁸ Contingent remainders and all of the other mentioned types of interests in expectancy were inalienable at common law,³⁵⁹

³⁵⁶ Freehold reversion expectant upon a term for years: *Pesehale v. Fitz Aucher*, Bract. N.B., pl. 533 (1231); Reversion in a term for years: *Rawlyns's Case*, 4 Co. Rep. 52a, 76 Eng. Rep. 1007 (1587); Reversion in fee expectant upon a lesser freehold: *Cambridge v. Risle*, R.S.Y.B. 34 Edw. I, 314 (1306); *Edward Fox's Case*, 8 Co. Rep. 93b, 77 Eng. Rep. 616 (1609). So far as present rights against the tenant in possession (rent due under a lease or sublease, etc.) attornment, voluntary or compulsory, was necessary to complete the transfer until Stat. 4 Ann., c. 16, §9 (1705), but the reversion, so far as it was an interest in expectancy, passed by the grant or assignment, without attornment. *Rawlyns's Case*, *supra*.

³⁵⁷ *Bruerton v. Rainsford*, Cro. Eliz. 15, 78 Eng. Rep. 281 (1583); *Wheeler v. Thorogood*, Cro. Eliz. 127, 78 Eng. Rep. 384 (1589); *Saffyn's Case*, 5 Co. Rep. 123b, 77 Eng. Rep. 248, sub nom. *Saffyn v. Adams*, Cro. Jac. 60, 79 Eng. Rep. 50 (1605).

³⁵⁸ *N. v. Crowe*, R.S.Y.B. 21 Edw. I, 185, 189 (1293); *Sheppard, TOUCHSTONE OF COMMON ASSURANCES* 238 (1648).

³⁵⁹ Contingent estates (remainders, uses, and executory interests), see: *Lampet's Case*, 10 Co. Rep. 46b, 77 Eng. Rep. 994 (1612); *King v. Withers*, Cases T. Talbot 117 at 123, 25 Eng. Rep. 693 at 695 (1735); *Doe ex dem. Brune v. Martyn*, 8 B. & C. 497 at 516, 108 Eng. Rep. 1127 at 1134 (1828). A transfer for consideration of a shifting use was given effect in equity after the contingency occurred in *Wright v. Wright*, 1 Ves. Sr. 409, 27 Eng. Rep. 1111 (1749-50) and it was decided in the nineteenth century that a contingent future estate could be transferred, by way of estoppel, by levying a fine, *Doe ex dem. Christmas v. Oliver*, 10 B. & C. 181, 109 Eng. Rep. 418 (1829), but the confusion in the authorities reflected in *Doe ex dem. Brune v. Martyn*, *supra*, indicates that the possibility of making an effective voluntary transfer of a contingent future estate in any way was, to say the least, highly doubtful throughout the seventeenth and eighteenth centuries. A contingent estate could be transferred by the commissioners in bankruptcy of the owner. *Higden v. Williamson*, 3 P. Wms. 132, 24 Eng. Rep. 1000 (1732); 1 Co. Rep. 66b, *Fraser's Note Z*. Right of entry: Stat. 32 Hen. VIII, c. 9, §1 (1540); *Partridge v. Strange*, 1 Plowden 77 at 88, 75 Eng. Rep. 123 at 140 (1552) (holding that such interests were inalienable at common law and that the statute subjected them to forfeiture for attempted alienation); *Sir Moyle Finch's Case*, 6 Co. Rep. 63a at 70a, 77 Eng. Rep. 348 at 362 (1606);

except that a right of entry on breach of condition subsequent which was appurtenant to a reversion could be transferred with the reversion,³⁶⁰ and an otherwise inalienable interest in expectancy could be released to the owner of a present estate.³⁶¹ Reversions in estates for years, the second type of reversion mentioned above, and *interessia termini* passed as chattel interests on the death of the owner and could always be bequeathed by will.³⁶² Reversions, remainders, and other interests in expectancy in fee were heritable, and those which were estates were devisable.³⁶³ This was the state of the English law when it was brought to Michigan by the Upper Canada statute of 1792.³⁶⁴

The English authority on the validity of restraints on alienation of interests in expectancy is scanty. In 1382 it was decided that a condition in a life lease, that if the

Goodright ex dem. Fowler v. Forrester, 8 East 552, 103 Eng. Rep. 454 (1809); Littleton, TENURES §347 (1481); 1 Coke, INSTITUTES 265a (Butler's Note No. 212 to 13th ed., 1787); Dower: See 1 Coke, INSTITUTES 32b.

³⁶⁰ Stat. 32 Hen. VIII, c. 34, §1 (1540).

³⁶¹ Lampet's Case, 10 Co. Rep. 46b, 77 Eng. Rep. 994 (1612). A married woman could not make an ordinary conveyance to her husband or anyone else, but dower could be released by the husband and wife levying a fine or suffering a common recovery in favor of a purchaser of the husband's estate. *Id.* at 49b, 77 Eng. Rep. at 1000; 1 Cruise, DIGEST OF THE LAWS OF ENGLAND RESPECTING REAL PROPERTY 187; 5 *id.*, 178-179, 417. Curtesy initiate was not an interest in expectancy but a present possessory estate for life.

³⁶² 1 Coke, INSTITUTES 46b.

³⁶³ King v. Withers, Cases T. Talbot 117 at 123, 25 Eng. Rep. 693 at 695 (1735) (intestate succession); Selwyn v. Selwyn, 2 Burr. 1131, 97 Eng. Rep. 750 (1761) (contingent executory interest devisable); Roe ex dem. Perry v. Jones, 1 H. Bl. 30, 126 Eng. Rep. 20 (1788) (contingent remainder devisable); Goodright ex dem. Fowler v. Forrester, 8 East 552, 103 Eng. Rep. 454 (1809) (right of entry not devisable). The descent of a future interest was peculiar in that, when it became possessory, the heir of the person who had last acquired it by purchase (i.e., other than by descent) took. This was not necessarily the heir of the last person who had owned the interest. 3 Simes, FUTURE INTERESTS 169 (1936).

³⁶⁴ 32 Geo. III, (Upper Canada), c. §3 (1792), note 33 *supra*.

lessor conveyed the reversion it should be forfeited to the life tenant, was void.³⁶⁵ In 1587 a provision in a will that if devisees of a contingent remainder in fee simple "go about to sell" before the remainder vested they should forfeit their estate was treated as valid.³⁶⁶ As contingent remainders were inalienable at that time, the decision is not conclusive as to the validity of a penalty restraint on alienation of a contingent future interest. The modern English cases indicate that such a restraint is valid, but they are not in harmony as to the validity of restraints on vested interests in expectancy.³⁶⁷ The weight of American authority tends toward the view that penalty restraints on alienation of contingent future interests intended to operate only while they remain contingent, are valid, but that restraints on alienation of indefeasibly vested estates in expectancy are valid only to the extent that they would be valid as applied to like possessory estates.³⁶⁸

³⁶⁵ Plesyngton's Case, Bellewe 101, 72 Eng. Rep. 43 (1382); Statham, ABRIDGEMENT, Conditions, pl. 14. But see Perkins, PROFITABLE BOOKE §§729, 730 (1642). It may be that this case was decided on the basis of the common-law rule that a condition could not enure to the benefit of anyone other than the lessor. The case was cited in support of this rule in Anonymous, Y.B. 21 Hen. VII, Hil., pl. 12 (1505). See Brooke, GRAUNDE ABRIDGEMENT, Conditions, pl. 83 (1573). If this is the basis of the decision in Plesyngton's Case, it is not of much help in determining the law of restraints on alienation.

³⁶⁶ Large's Case, 2 Leon. 82, 3 Leon. 182, 74 Eng. Rep. 376, 620 (1587). It was held that the giving of a 240-year lease by one of the remaindermen was not a breach of the restraint.

³⁶⁷ Gray, RESTRAINTS ON ALIENATION, 2d ed., 33-38 (1895); Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.54 (1952); Sweet, "Restraints on Alienation," 33 L.Q. REV. 236 at 246 (1917); Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 YALE L.J. 961, 1186 at 1214-1215 (1935); 2 Simes, FUTURE INTERESTS 311-312 (1936).

³⁶⁸ The cases have been collected by Professors Schnebly and Simes, note 367 *supra*. Professor Schnebly says (AMERICAN LAW OF PROPERTY, §26.53; p. 1213 of article), "No authority has been found which has divided the restraint, and upheld it for the period of time during which the future interest may remain non-possessory."

The *Restatement of Property* takes the position that all prohibitory restraints on alienation of future estates which would otherwise be alienable, that is, restraints which would compel the owner to remain such against his will, are void.³⁶⁹ As to penalty restraints, the *Restatement* considers a restraint which may last until after the interest becomes possessory or becomes indefeasibly vested is valid only if a like restraint on a possessory estate of the same duration would be. It takes no position on the validity of penalty restraints which are certain not to operate after the estate becomes possessory or indefeasibly vested.³⁷⁰

The Michigan statutes codify the law of estates in expectancy and provide that they are descendible, devisable, and alienable, in the same manner as estates in possession.³⁷¹ Consequently the question of the alienability

³⁶⁹ Section 405 and §411, comment *a* (1944).

³⁷⁰ Section 411. The *Restatement*, unlike the Michigan statutes, treats reversions, possibilities of reverter, and rights of entry on breach of condition subsequent as future interests. Sec. 153, comment *a*; §154, comment *e*; §155; Rev. Stat. 1846, c. 62, §9; note 371 *infra*. The *Restatement* does not treat possibilities of reverter and rights of entry as future estates, however, and it does not deal with inchoate dower and curtesy initiate. Sections 154 (3), 155, 153 (1) (2).

³⁷¹ Rev. Stat. 1838, p. 266, §24, provided: "When any contingent remainder, executory devise, or other estate in expectancy, is so granted or limited to any person, that in case of his death before the happening of the contingency, the estate would descend to his heirs in fee simple, such person may, before the happening of the contingency, sell, assign, or devise the premises, subject to the contingency." This was superseded by the following provisions of Rev. Stat. 1846, c. 62, which are still in force:

"Sec. 7. Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy.

"Sec. 8. An estate in possession is where the owner has an immediate right to the possession of the land; an estate in expectancy is where the right to the possession is postponed to a future period.

"Sec. 9. Estates in expectancy are divided into, First. Estates commencing at a future day, denominated future estates; and, Second. Reversions.

"Sec. 10. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent

of contingent future estates has not been in doubt here.³⁷² The questions which have caused difficulty have been those which involve interests in expectancy which are not estates. Until the rule was changed by statute in 1847, Michigan held that a disseisee, that is, the owner

estate, or on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time.

"Sec. 11. When a future estate is dependent upon a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

"Sec. 12. A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised.

"Sec. 13. Future estates are either vested or contingent: They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which they are limited to take effect remains uncertain.

"Sec. 35. Expectant estates are descendible, devisable and alienable in the same manner as estates in possession.

"Sec. 42. All expectant estates, except such as are enumerated and defined in this chapter, are abolished."—Comp. Laws (1857) §§2591 to 2597, 2619, 2626; Comp. Laws (1871) §§4074 to 4080, 4102, 4109; Comp. Laws (1897) §§8789 to 8795, 8817, 8825; How. Stat., §§5523 to 5529, 5551, 5558; Comp. Laws (1915) §§11525 to 11531, 11553, 11560; Comp. Laws (1929) §§12927 to 12933, 12955, 12962; Mich. Stat. Ann., §§26.7 to 26.13, 35, 42; Comp. Laws (1948) §§554.7 to 554.13, 554.35, 554.42. See also §§14, 15, 16, 17, 18, 19, 20, 21, 23, 24, notes 257, 279, 307 *supra*. The effect of these statutes is discussed in Chapter 11, Section C., *infra*.

Despite sections 9 and 10, it has been held that a reversion expectant upon an estate for years is a present estate in possession. *Toms v. Williams*, 41 Mich. 552 at 572, 2 N.W. 814 (1879). See *PROPERTY RESTATEMENT* §154, comment f; *Cf. Challis, LAW OF REAL PROPERTY*, 3d ed., 99-100 (1911).

³⁷² *Inter vivos* transfer: *Russell v. Musson*, 240 Mich. 631, 216 N.W. 428 (1927). But see *Menard v. Campbell*, 180 Mich. 583, 147 N.W. 556 (1914) (holding that a conveyance by a contingent remainderman was void because she was a married woman). Transfer by bankruptcy: *Horton v. Moore*, (6th Cir. 1940) 110 F. (2d) 189, cert. den., *Moore v. Horton*, 311 U.S. 692 (1940), rehearing den. 311 U.S. 728 (1940). Transfer by will: see *L'Etourneau v. Henquenet*, 89 Mich. 428, 50 N.W. 1077 (1891). Intestate descent: *Curtis v. Fowler*, 66 Mich. 696, 33 N.W. 804 (1887). The problem was complicated, however, by decisions finding an implied condition of survivorship until the estate vested. Thus, in *Hadley v. Henderson*, 214 Mich. 157, 183 N.W. 75 (1921) a shifting executory interest to a daughter in case a devisee in fee died without issue was held to "lapse" upon the death of the daughter

of land in the adverse possession of another, could not convey it to anyone except the person in possession.³⁷³ Similarly, until the rule was abrogated by statute in 1931, it was held that a right of entry on breach of condition subsequent not appurtenant to a reversion was inalienable and that an attempt to transfer such a right forfeited it.³⁷⁴ A right of entry on breach of condition sub-

before the first devisee, and in *In re Coots' Estate*, 253 Mich. 208, 234 N.W. 141 (1931), cert den. *sub nom.* *Dellbridge v. Oldfield*, 284 U.S. 665 (1931) a contingent remainder to nieces and nephews if a life tenant should die without issue was held to "lapse" as to nieces and nephews who predeceased the life tenant. See 2 Simes, *FUTURE INTERESTS* 90-95 (1936). In an attempt to overrule these decisions the legislature, by Act 211, P.A. 1931; Mich. Stat. Ann. §26.47; Comp. Laws (1948) §554.101, provided: "In all cases where the owner of an expectant estate, right or interest in real or personal property, shall die prior to the termination of the precedent or intermediate estate, if the contingency arises by which such owner would have been entitled to an estate in possession if living, his heirs at law if he died intestate, or his devisees or grantees and assigns if he shall have devised or conveyed such right or interest, shall be entitled to the same estate in possession." The statute has been treated as effective for the intended purpose but not retroactive. *Stevens v. Wildy*, 281 Mich. 377, 275 N.W. 179 (1937); *Dodge v. Detroit Trust Company*, 300 Mich. 575, 2 N.W. (2d) 509 (1942). See part Two at notes 261-266 *infra*.

³⁷³ *Bruckner's Lessee v. Lawrence*, 1 Doug. 19 (Mich. 1843) [holding that Stat. 32 Hen. VIII, c. 9, §1 (1540) note 359 *supra*, to the same effect, was not in force here, but that a conveyance by a disseisee was void at common law as an act of maintenance]; *Stockton v. Williams*, 1 Doug. 546 (Mich. 1845) (giving limited effect to the conveyance); *Hubbard v. Smith*, 2 Mich. 207 (1851); *Crane v. Reeder*, 21 Mich. 24 (1870). Rev. Stat. 1846, c. 65, §7, provided, "No grant or conveyance of lands or interest therein, shall be void for the reason that, at the time of the execution thereof such lands shall be in the actual possession of another claiming adversely." Comp. Laws (1857) §2726; Comp. Laws (1871) §4209; How. Stat. §5657; Comp. Laws (1897) §8961; Comp. Laws (1915) §11693; Comp. Laws (1929) §13283; Mich. Stat. Ann. §26.526; Comp. Laws (1948) §565.7. Probably the statute transforms the right of entry of a disseisee into a present possessory estate.

³⁷⁴ *Halpin v. Rural Agricultural School District No. 9*, 224 Mich. 308, 194 N.W. 1005 (1923); *County of Oakland v. Mack*, 243 Mich. 279, 220 N.W. 801 (1928); *Fractional School District No. 9 v. Beardslee*, 248 Mich. 112, 226 N.W. 867 (1929); *Quinn v. Pere Marquette Ry. Co.*, 256 Mich. 143, 239 N.W. 376 (1931); *Avery v. Consumers Power Co.*, 265 Mich. 696, 253 N.W. 189 (1934); *Dolby v. State Highway Commissioner*, 283 Mich. 609, 278 N.W. 694 (1938); *Juif v. State Highway Commissioner*, 287 Mich. 35, 282 N.W. 892 (1938). *Contra*,

sequent appurtenant to a reversion expectant upon an estate for years is alienable with the reversion,³⁷⁵ and the same seems to be true as to a right of entry on breach of condition subsequent appurtenant to a reversion expectant upon a freehold estate, even though created after the repeal of the English statutes and before the enactment of the Michigan statute of 1931.³⁷⁶ Michigan probably recognizes the existence of possibilities of reverter and holds them inalienable, the 1931 statute being limited to rights of entry on breach of condition subsequent.³⁷⁷ Inchoate dower may be released to the hus-

as to the forfeiture: PROPERTY RESTATEMENT, §160, Comment c. (1948 Supp.). Act 219, P.A. 1931; Mich. Stat. Ann. §26.851; Comp. Laws (1948) §554.111, provides: "The reversionary interest in lands conveyed on a condition subsequent may be granted, conveyed, transferred or devised by the owner of such interest, and by the subsequent grantees or devisees thereof, either before or after the right of re-entry becomes effective: Provided, That this act shall not affect any such interest created before it takes effect." A right of entry on breach of condition subsequent reserved in a conveyance in fee must be distinguished from the title remaining in an owner in fee who has granted an easement determinable upon cessation of the prescribed use. The fee subject to the easement may be transferred. *Mahar v. Grand Rapids Terminal Ry. Co.*, 174 Mich. 138, 140 N.W. 535 (1913). See *Quinn v. Pere Marquette Ry. Co.*, *supra*.

³⁷⁵ *Patterson v. Carrel*, 171 Mich. 296, 137 N.W. 158 (1912); *Miller v. Pond*, 214 Mich. 186, 183 N.W. 24 (1921).

³⁷⁶ *Hamilton v. Wickson*, 131 Mich. 71, 90 N.W. 1032 (1902); *Hess v. Haas*, 230 Mich. 646, 203 N.W. 471 (1925); 3 Simes, FUTURE INTERESTS 162 (1936).

³⁷⁷ *Thayer v. McGee*, 20 Mich. 195 (1870); *School District No. 5 of Delhi v. Everett*, 52 Mich. 314, 17 N.W. 926 (1883); *Fractional School District No. 9 v. Beardslee*, 248 Mich. 112, 226 N.W. 867 (1929). See *Quinn v. Pere Marquette Ry. Co.*, 256 Mich. 143, 239 N.W. 376 (1931). The Michigan Supreme Court has not always been careful of its terminology and has sometimes tended to confuse the common-law possibility of reverter with the right of entry on breach of condition subsequent. Although both of these interests are inalienable if created before the 1931 statute and the possibility of reverter is probably still inalienable, it would seem that a shifting use limited to the grantor should be alienable like any other future estate. See note 354 *supra*; 3 Simes, FUTURE INTERESTS 159-160 (1936). As to the validity of a limitation of a shifting use to the grantor, see 1 Simes, 273-274.

band³⁷⁸ or to a purchaser of the fee,³⁷⁹ but unassigned dower is otherwise inalienable, even after it has become consummate by the death of the husband.³⁸⁰

*Walton v. Torrey*³⁸¹ was a suit to restrain eviction proceedings. A testator devised land to his widow for life, remainder to his children in fee simple with a proviso that it should "remain undivided in the use, occupation and possession of all my children now living, until the youngest child attains the age of 21 years." The widow and those children who were of age executed conveyances purporting to transfer their interests to the defendant, and later, before the youngest child was 21, brought

³⁷⁸ *Randall v. Randall*, 37 Mich. 563 (1877); *Rhoades v. Davis*, 51 Mich. 306, 16 N.W. 659 (1883); *Owen v. Yale*, 75 Mich. 256, 42 N.W. 817 (1889); *Wright v. Wright*, 79 Mich. 527, 44 N.W. 944 (1890); *Dakin v. Dakin*, 93 Mich. 284, 56 N.W. 562 (1893); *Chittock v. Chittock*, 101 Mich. 367, 59 N.W. 655 (1894); *McKelvey v. McKelvey*, 112 Mich. 274, 70 N.W. 582 (1897); *La Plant v. Lester*, 150 Mich. 336, 113 N.W. 1115 (1907); *In re Berner's Estates*, 217 Mich. 612, 187 N.W. (1912); *Hagerty v. Union Guardian Trust Co.*, 258 Mich. 133, 244 N.W. 211 (1932). As between the husband and wife, the consideration for such a release must be adequate: *Wright v. Wright*, *supra*; *Bechtel v. Barton*, 147 Mich. 318, 110 N.W. 935 (1907).

³⁷⁹ Rev. Stat. 1846, c. 66, §13; Comp. Laws (1857) §2784; Comp. Laws (1871) §4281; Comp. Laws (1897) §8930; How. Stat. §5745; Comp. Laws (1915) §11662; Comp. Laws (1929) §13080; Mich. Stat. Ann. §26.229; Comp. Laws (1948) §558.13. Inchoate dower is bound by the wife's joinder in the husband's mortgage, *Oades v. Standard Savings & Loan Assn.*, 257 Mich. 469, 241 N.W. 262 (1932), or executory land contract, *Hendricks v. Wolf*, 279 Mich. 598, 273 N.W. 282 (1937). Cf. *Richmond v. Robinson*, 12 Mich. 193 (1864). A wife may give her husband a power of attorney to bar dower by joining her in his conveyances. *Continental National Bank v. Gustin*, 297 Mich. 134, 297 N.W. 214 (1941).

³⁸⁰ Inchoate dower: *Lott v. Lott*, 146 Mich. 580, 109 N.W. 1126 (1906); Cf. *Raynor v. Lee*, 20 Mich. 384 (1870); Unassigned dower consummate: *Galbraith v. Fleming*, 60 Mich. 408, 27 N.W. 583 (1886). However, in *Johnston v. Loose*, 201 Mich. 259, 167 N.W. 1021 (1918), where the widow quit-claimed unassigned dower to the plaintiff and later released it to the heirs, it was held that the plaintiff was entitled in equity as against both the widow and the heirs to compel the widow to secure admeasurement of her dower and convey it to him.

³⁸¹ *Harr. Ch.* 259 (Mich. circa 1836). The restraint also involved possessory estates. This aspect of the case has been discussed above at note 135.

this suit. The interests of the minor children had been conveyed to the defendant under probate court license. An injunction was dissolved, the Chancellor holding that the restraint was upon partition, not upon alienation, and that its validity need not be decided. He stated that provisions in restraint of alienation are not to be favored.

*Mandlebaum v. McDonell*³⁸² was a suit to quiet title. A will, as construed by the court, devised land to the testator's widow for life with remainder in fee simple to his three sons, a grandson, Ellen Daily and Ann Baxter, the interests of the latter two being subject to a condition subsequent requiring them to live with the widow until they married. The will provided:

"the same to remain unsold until (the grandson) shall be twenty-five years of age, or until twenty-one years from the date hereof, in case of his death, and not then to be sold in case my wife is still living, and that she remains my widow, and until after her death."

The will also stated that the devises were upon condition that, until the period mentioned had elapsed,

"it shall not be competent for any of my devisees hereinbefore named to either dispose of, alienate, mortgage, barter, pledge or transfer any portion of the real estate . . . , either directly or indirectly, upon any pretext whatever, All documents or instruments whatever, executed by any of my devisees, which shall be in contravention of the true intent and meaning of this, my last will and testament, shall be deemed and be taken to be null and void and of no effect whatever."

The three sons and the grandson were the sole heirs at law. Ann Baxter did not live with the widow until her marriage; Ellen Daily did. The widow did not remarry. After the marriage of Ellen Daily, she, the

³⁸² 29 Mich. 78 (1874). Also discussed above at note 138.

widow, the three sons and the grandson, who was not yet 25, executed conveyances under which the plaintiff claimed. The court affirmed a decree for the plaintiff, holding that the conveyances were effective to give the plaintiff an absolute title in fee simple. The court thought the language of the will was intended to impose a prohibition on alienation and held that such a restraint upon a vested remainder in fee simple is void, saying also that a forfeiture restraint upon alienation of a vested remainder in fee simple is likewise void. The opinion states,

"Nor does the fact that, in the case of an executory devise, or in that of a contingent remainder, or any other interest *not vested*, a restriction upon the power of the devisees to sell before it shall become vested in interest, would be good, in any manner tend to sustain such a restriction upon a vested estate in fee." ³⁸³

Harlow v. Lake Superior Iron Company ³⁸⁴ was an action of ejectment brought by an assignee of an undivided half of a 99-year lease. The lease, given by the owner in fee simple of the land, demised an undivided half of the land for mining purposes, and provided,

"I hereby agree and bind myself not to sell, assign, or encumber said undivided interest hereby leased, unless said (lessee), his heirs or assigns, shall have the first refusal to purchase said undivided one-half, . . ."

A judgment for the defendants was affirmed on the ground the lease demised only an incorporeal interest which could not be subdivided or recovered in ejectment. The opinion contains language suggesting the validity of the pre-emptive option granted by the quoted provision of the lease. ³⁸⁵

³⁸³ 29 Mich. 78 at 88-89 (1874).

³⁸⁴ 36 Mich. 105 (1877). Also mentioned above at note 312.

*Lariverre v. Rains*³⁸⁶ was a suit to set aside conveyances as a cloud on title. Mrs. White executed an instrument conveying to her husband an estate for his life to commence at her death, then to her son Joseph an estate for his life, providing each "sees fit to use and occupy the same so long as a home and residence," and the fee simple expectant upon the prior life estates to the children of Joseph,

"It being expressly understood and agreed that the right to use and occupy, as above stated, is intended to be a life interest, and not transferable,"

so far as the husband and Joseph were concerned. Later Mr. and Mrs. White conveyed the land in fee to Doyle, who conveyed to the defendants. Mrs. White died and the children of Joseph brought this suit in the lifetime of Mr. White and Joseph. The court reversed a decree for the defendants, holding that the life estates of Mr. White and Joseph were forfeited by alienation and ceasing to occupy the land. The opinion takes no account of the facts that Joseph had not attempted to convey his future life estate and that he could have no right to occupy before that estate became possessory. As both life estates were future interests, the decision seems to stand for the proposition that a penalty restraint upon alienation of a vested future estate for life is valid even though so phrased as to continue after the estate becomes possessory.

*Portage Grange No. 16 v. Portage Lodge No. 340*³⁸⁷ was a suit to restraint interference with the plaintiff's lessee. The plaintiff leased a lodge room to the defen-

³⁸⁶ 112 Mich. 276, 70 N.W. 583 (1897). Also discussed at note 264 *supra*.

³⁸⁷ 141 Mich. 402, 104 N.W. 667 (1905). Also discussed above at note 168.

dant, for use in common by both parties, the lease providing that the premises "cannot be leased or rented to any lodge" without the consent of both. The plaintiff, without the consent of the defendant, leased the room to the Ladies of the Modern Maccabees, for use in common with the defendant. The defendant refused to allow the ladies to use the room. The court affirmed a decree for the defendant, assuming without discussion the validity of the restraint on alienation. If the plaintiff was the owner in fee simple,³⁸⁸ the decision operates to enforce as a prohibition a restraint on alienation of a reversion in fee. This is clearly in conflict with *Mandlebaum v. McDonell*.³⁸⁹ Even if the interest of the plaintiff was less than a fee, the decision is in conflict with the well-settled rules that no prohibitory restraint on alienation of a legal interest is valid and that restraints on alienation may be imposed only for the benefit of a reversion or remainder in the land.

*Des Grand Champ v. Duflo*³⁹⁰ was a suit to construe a will which devised a life estate to the testator's brother, remainder to some of the testator's heirs. A clause of the will relating to the remainder provided, "It is my wish that the property . . . remain unsold . . . I make

³⁸⁸ The pleadings indicate that, some twenty-five years before this litigation, the two organizations which were the principal parties to it, agreed informally to purchase land and erect a hall on it cooperatively with a view to use in common. Title was taken in the name of the plaintiff grange alone because the defendant lodge was unincorporated. The defendant lodge contended that the 99-year lease involved in the litigation did not correctly represent the original understanding. Record, pp. 1, 11, 12, 19, 20. The opinions of both the circuit and supreme courts treat the plaintiff grange, however, as owning a fee simple in severalty, subject only to the 99-year lease. If, as perhaps should have been done, the plaintiff grange had been treated as holding the legal fee on trust for itself and the defendant lodge, the problem involved would have been one of the law of trusts.

³⁸⁹ Note 382 *supra*.

³⁹⁰ 169 Mich. 104, 135 N.W. 98 (1912).

this request because it was the wish of my father that the Fisheries remain unsold and be known as the Duflo property." The court held that this provision was not intended to be mandatory, but that if it were it would be void.

*Conant v. Stone*³⁹¹ was a suit to construe a will providing,

"My said son to have the use and income from said estate so long as Lizzie Rice, his present wife, remains as his legal wife, but in case of her death or in case of a legal separation and divorce from my said son, I then give, devise and bequeath to my said son and to his heirs and assigns forever, said above mentioned interest in my estate."

Later clauses provided that the son should forfeit his interest in the income if he attempted to transfer it and directed the executors to sell all real estate and reinvest within seven years. The son died a month after the testator, still living with his wife Lizzie. The court held that the condition regarding the wife being precedent, it made no difference whether it was contrary to public policy. The condition not having been performed, the fee did not pass to the son under the will. Although the condition in question was the one which related to mar-

³⁹¹ 176 Mich. 654, 143 N.W. 39 (1913). The case involved real estate only. There is dictum in *Dusbiber v. Melville*, 178 Mich. 601 at 603, 146 N.W. 208 (1914), that when an illegal condition precedent, interfering with the marriage relationship, is annexed to a bequest of personal property, only the condition is void and the bequest is effective as if there had been no condition. The *Restatement of Property* applies the rule of the *Dusbiber* case, as to conditions precedent which are illegal for some other reason than as restraints on alienation, to both real and personal property. §424, comment *d*; §425, comment *h*; §426, comment *e*; §427, comment *f*; §428, comment *l*; §429, comment *j*; §433, comment *f* (1944). Both the rule laid down by *Conant v. Stone* and that of the *Restatement* are criticized in Browder, "Illegal Conditions and Limitations: Effect of Illegality," 47 MICH. L. REV. 759-774 (1949).

riage rather than the one which restrained alienation, the decision is significant for purposes of the law of restraints on alienation because it indicates that a restraint, although illegal, will be effective if so imposed as to be a condition precedent to the vesting of a future interest.

*Watkins v. Minor*³⁹² was a suit for specific performance of an option. Elizabeth Minor conveyed land in fee simple to her son Clarence, his estate to commence at her death, by a deed providing, "said second party is not to convey or encumber said property during the lifetime of said first party." Clarence, during his mother's lifetime, gave the option in question, and the mother was alive during the pendency of this suit to enforce it. A decree for the plaintiff was affirmed on the ground the restraint on alienation was void. The court relied upon *Mandlebaum v. McDonell*,³⁹³ using language indicating that every restraint on alienation of an indefeasibly vested future estate in fee simple, whether by way of prohibition or of penalty, is void. The case is significant in establishing that all such restraints are void, even though so worded as not to be operative after the estate becomes possessory.

*Portage Grange No. 16 v. Portage Lodge No. 340*³⁹⁴ is clearly wrong and ought to be overruled. Disregarding it entirely and giving full scope to the opinion in *Mandlebaum v. McDonell*,³⁹⁵ it is possible to sum up the Michigan law of restraints on alienation of legal interests in expectancy as follows: Every prohibitory restraint on

³⁹² 214 Mich. 308, 183 N.W. 186 (1921). At common law the interest conveyed to Clarence would have been a springing use. Our statutes permit the creation of such an interest (Rev. Stat. 1846, c. 62, §24, note 257, *supra*) but probably term it a remainder. Part Two, note 180 *infra*.

³⁹³ Note 282 *supra*.

³⁹⁴ Note 387 *supra*.

³⁹⁵ Note 382 *supra*.

an otherwise alienable interest in expectancy, designed to compel the owner of the interest to remain such in spite of his efforts to rid himself of it, is void. All penalty restraints on alienation of indefeasibly vested estates in expectancy are void, even though so phrased as to be operative only while the estate remains non-possessory, unless a similar restraint on a like possessory estate would be valid. Penalty restraints on contingent interests in expectancy, so phrased as to be conditions precedent to the vesting of the interest and to terminate on the vesting of the interest are probably valid, even though the expectant interest is in fee simple.³⁹⁶ Whether penalty restraints on alienation of expectant interests in fee which are vested subject to open or subject to divestment, remains undecided. Doubt exists as to whether a penalty restraint on a contingent or defeasibly vested interest in expectancy, so phrased as to remain operative after the interest becomes indefeasibly vested, is valid in part, as to the period before the interest vests indefeasibly. Upon principle, restraints of the types described in the last two sentences should be held to be invalid, unless a similar restraint upon a present possessory interest would be valid.

³⁹⁶ It should be borne in mind that the Michigan statutory definitions of vested and contingent interests may not be wholly in accord with the common-law rules of distinction between such interests. 1 Simes, *FUTURE INTERESTS* §89 (1936); Roberts, "Transfer of Future Interests," 30 MICH. L. REV. 349 at 350-351 (1932); Chapter 11, Section C, *infra*.

CHAPTER 7

Legal Interests in Chattels Personal

A. THE DIFFERENCES BETWEEN LAND AND CHATTELS

SIR EDWARD COKE, in commenting on Section 360 of Littleton's *Tenures*,⁴⁰¹ said,

"if a man be possessed of a lease for years, or of a horse, or of any other chattell reall or personall, and give or sell his whole interest or propertie therein upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and propertie is out of him, so as he hath no possibilitie of reverter, and it is against trade and traffique, and bargaining and contracting between man and man: . . ." ⁴⁰²

The precise meaning of the Lord Chief Justice is not as clear as might be desired, but the passage probably asserts two reasons for the invalidity of a condition subsequent, providing for forfeiture on alienation, incident to a transfer of a chattel: (1) that a legal interest analogous to a possibility of reverter or right of entry on breach of condition subsequent cannot exist in a chattel personal, and (2) that such a condition is in illegal restraint of trade.

The first asserted reason involves the problem of the possibility of creating legal interests in expectancy in chattels personal. As Professor Maitland remarked, the law of personal property is "backward and meagre." ⁴⁰³ By comparison to the land law, the law of chattels personal is relatively undeveloped and such full develop-

⁴⁰¹ Note 110 *supra*.

⁴⁰² 1 INSTITUTES 223a.

⁴⁰³ 2 Pollock & Maitland, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 181 (1895).

ment as there is is fragmentary and disconnected. The reasons are largely historical. In the centuries when the doctrine of estates in land was being developed and defined, the common chattels, animals, foodstuffs, and clothing, were not of a nature to encourage attempts to create complex and divided titles. The Mediaeval Church's prohibition of interest prevented extensive security transactions. The tremendous current investment of wealth in bonds, corporate stock, and life insurance policies, which we look upon as property for some purposes, is wholly a modern development. Moreover, whereas the law of land was developed and unified by a single tribunal, the Court of Common Pleas, the law of chattels was created by numerous courts with divergent systems of jurisprudence and varying concepts of policy. The ecclesiastical courts of the English dioceses handled probate of wills and administration of estates according to rules of canon law which varied with the customs of the several sees. Their jurisdiction was of doubtful extent, interfered with by the jealousy of the common-law courts and eventually absorbed in large part by the High Court of Chancery. The courts of common law provided most of the protection of chattels against crime and tort, but the High Court of Admiralty, administering a system based on the Roman civil law, had a part in developing the law of ships and other marine property. Until its competing courts, administering divergent systems of law, were consolidated in the nineteenth century, England was in no position to develop a complete and unified law of personal property which could stand beside the elaborate scheme of the land law.⁴⁰⁴

The law of chattels developed by the common-law

⁴⁰⁴ 3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 351-360, 534-595 (1923); 7 *id.* 447-515 (1926).

courts has two striking omissions. First, it contains no concept of ownership of chattels like that of ownership of land. It is, rather, a law of rights to possession of chattels and injuries to such rights. The only common-law actions for specific recovery of chattels, replevin and detinue, could be converted into actions for money damages at the will of the defendant.⁴⁰⁵ The owner of a freehold interest in land had remedies at law, the real actions and, later, ejectment, by which he could secure the land itself. As has been seen, the owner of a chattel real acquired a like remedy.⁴⁰⁶ The "owner" of chattels personal never did. So far as the common-law courts are concerned, his only right was to bring an action for money damages for wrongful taking or detention.⁴⁰⁷

Second, the law of chattels has no doctrine of estates, of ownership divided into temporal segments. At the beginning of the thirteenth century the common law was consistent in requiring, as to both land and chattels, a delivery of possession to effectuate a transfer of a proprietary interest.⁴⁰⁸ During that century the requirement was modified as to land by the recognition of the remainder. A single livery of seisin to A could be made to pass a life estate to A and a remainder in fee, a present proprietary right to future possession, to B.⁴⁰⁹ The en-

⁴⁰⁵ Anonymous R.S.Y.B. 14, 15, Ed. III, 30 (1340); Anonymous, Y.B. 1 Hen. V, Hil., pl. 4 (1413); *Peters v. Heyward*, Cro. Jac. 682, 79 Eng. Rep. 591 (1624).

⁴⁰⁶ *Snane v. Rumenal*, Bract. N.B., pl. 1140 (1235); Anonymous, Y.B. 7 Ed. IV, Pasch., pl. 16 (1468); Anonymous, Y.B. 21 Ed. IV, Mich., pl. 2 (1482).

⁴⁰⁷ 3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 322 (1923); 7 *id.*, 455-456 (1926). Equity will, under some circumstances, compel delivery of unique chattels. *Pusey v. Pusey*, 1 Vern. 273, 23 Eng. Rep. 465 (1684); *Duke of Somerset v. Cookson*, 3 P. Wms. 390, 24 Eng. Rep. 1114 (1735); *Fells v. Read*, 3 Ves. Jr. 70, 30 Eng. Rep. 899 (1796).

⁴⁰⁸ 3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 354 (1923).

⁴⁰⁹ 2 Pollock & Maitland, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 25 (1895).

actment in 1535 of the Statute of Uses,⁴¹⁰ which converted the Chancery-developed uses into legal estates, made it possible to create legal future interests, by way of springing and shifting use, without any livery of seisin.⁴¹¹ Neither modification was extended to chattels. The common-law courts would not permit delivery of a chattel personal to A to operate to create a limited interest in A and a future interest in B; it passed the whole title to A.⁴¹² The Statute of Uses applied only to interests in land, so interests in chattels created by way of use remained purely equitable, without recognition or means of enforcement by the common-law courts.⁴¹³ The only temporally divided ownership in chattels recognized at common law was the bailment. The bailor has a proprietary interest in expectancy analogous to a reversion expectant upon an estate at will or for years in land. Unlike the lessor, however, he has no effective common-law means of compelling the bailee to return the goods at the expiration of the term.⁴¹⁴ Probably because of this lack of a specific remedy, the law of bailment has developed along contract, as distinguished from property, lines. Apart from the quasi-reversionary interest of the bailor, English law to this day does not permit the creation *inter vivos* of a legal property interest in expectancy in chattels personal.⁴¹⁵

⁴¹⁰ 27 Hen. VIII, c. 10 (1535).

⁴¹¹ 7 Holdsworth, *HISTORY OF ENGLISH LAW* 83 (1926).

⁴¹² Anonymous, *BROOK'S NEW CASES* 60, 73 Eng. Rep. 874 (1509-1546).

⁴¹³ Bacon, *READING UPON THE STATUTES OF USES* 43 (1804).

⁴¹⁴ Notes 405, 407, *supra*.

⁴¹⁵ 7 Holdsworth, *HISTORY OF ENGLISH LAW* 470-471 (1926); Good-eve, *MODERN LAW OF PERSONAL PROPERTY*, 8th ed., 10-11 (1937); Williams, *PRINCIPLES OF THE LAW OF PERSONAL PROPERTY*, 18th ed., 48, 438 (1926); Oliver, "Interests for Life and Quasi-Remainders in Chattels Personal," 24 L.Q. REV. 431-439 (1908). Professor Gray thought that chattels personal could be transferred subject to a condition subsequent, but he cited no authority for the proposition. *RULE AGAINST PERPETUITIES*, 3d ed., §78 (1915). *Accord*: with Gray: Perkins, *PROFITABLE BOOKE* §712 (1642).

The local canon law administered by the ecclesiastical courts, to whose judgments the courts of common law gave grudging recognition, permitted the transmission of chattels personal by will. Until the late seventeenth century, testamentary power of disposition of personalty by will was, however, much restricted by local custom, a married man usually having such power over only a third of his goods.⁴¹⁶ Unlike a devise of land under the sixteenth century Statute of Wills,⁴¹⁷ a bequest of chattels was not a direct transfer of legal title to the legatee. Legal title to all personal property of the deceased passed to his executor,⁴¹⁸ and the only right of a legatee was to have the ecclesiastical court compel the executor to carry out the provisions of the will. Except for the fact that he was controlled by the ordinary of the diocese rather than the High Court of Chancery, the executor was, for all essential purposes, a trustee, holding legal title subject to duties owed to creditors and legatees.⁴¹⁹

Even by will it was not possible to make a temporal division in the legal title to chattels personal. They could not be bequeathed to A for life, remainder to B. When the executor transferred them to A, A took the whole title.⁴²⁰ In the fifteenth century, however, a method

⁴¹⁶ 3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 550-563 (1923).

⁴¹⁷ 32 Hen. VIII, c. 1 (1540).

⁴¹⁸ Anonymous, Y.B. 14 Hen. IV, Hil., pl. 37 (1412); Anonymous, Y. B. 2 Ed. IV, Mich., pl. 1 (1462).

⁴¹⁹ 3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 519-595 (1923). By the seventeenth century the High Court of Chancery had assumed concurrent jurisdiction with the ecclesiastical courts to compel executors to carry out legacies, acting on the theory that an executor was a trustee, liable to account in equity as such. *Cliffe v. Cliffe*, Monro, *ACTA CANCELLARIAE* 425 (1575); *Browne v. Purton*, Tothill 86, 21 Eng. Rep. 131 (1589); *Yelverton v. Newport*, Tothill 129, 21 Eng. Rep. 144 (1593); *Bloomer's Case*, Cary 27, 21 Eng. Rep. 15 (1604); *Wickham v. Dighton*, Monro, *ACTA CANCELLARIAE* 109 (1607); *Earl of Pembroke v. Zouch*, Tothill 130, 21 Eng. Rep. 145 (1631); *Goffin*, *THE TESTAMENTARY EXECUTOR IN ENGLAND AND ELSEWHERE* 74 (1901).

⁴²⁰ Note 412 *supra*; Anonymous, March 106, pl. 183, 82 Eng. Rep. 432 (1641).

of creating future interests in chattels by will was developed. Chattels could be bequeathed to the executor, with directions to permit A to use and occupy them for life, then to transfer them to B.⁴²¹ In later centuries, when most of the enforcement and interpretation of wills shifted to the High Court of Chancery, wills purporting to create legal future interests in chattels tended to be construed as bequests of use and occupation, thus permitting their enforcement.⁴²²

It appears, therefore, that Sir Edward Coke's first reason⁴²³ suggests one major difference between the law of restraints on alienation of land and that of restraints on alienation of chattels, namely, that the limited possibilities of creating interests in expectancy in chattels greatly restrict the available devices for imposing restraints. His second reason suggests another major difference. Land was not looked upon as an article of commerce in the thirteenth and fourteenth centuries, and that remained so, as to estates of inheritance, throughout the mediaeval period. Hence the law of restraints on alienation of estates in fee simple and fee tail, developed during that period, is a law governing donative and testa-

⁴²¹ Anonymous, 37 Hen. VI, Trin., pl. 11 (1459); Fitz-James's Case, Owen 33, 74 Eng. Rep. 879 (1565); note 412 *supra*. See Welcden v. Elkington, 2 Plowd. 516, 75 Eng. Rep. 763 (1578); Paramour v. Yardley, 2 Plowd. 539, 75 Eng. Rep. 794 (1578). The trust being a much more satisfactory device for creating future interests in chattels, the law of legal future interests in chattels was never developed fully in England and there is much doubt as to their incidents and theoretical basis. Gray, RULE AGAINST PERPETUITIES, 3d ed., §§77-86, 789-856 (1915); 7 Holdsworth, HISTORY OF ENGLISH LAW 471-478 (1926); Bordwell, "Interests in Chattels Real and Personal," 1 Mo. L. REV. 119, 127-132, 137-141 (1936); Oliver, "Interests for Life and Quasi-Remainders in Chattels Personal," 24 L.Q. REV. 431-439 (1908); Simes, "Future Interests in Chattels Personal," 39 YALE L.J. 771-803 (1930). See Part Two, note 167 *infra*.

⁴²² Catchmay v. Nicholas, Rep. temp. Finch 116, 23 Eng. Rep. 63 (1673). Other cases are collected in Gray, RULE AGAINST PERPETUITIES §85n (1915).

⁴²³ Note 402 *supra*.

mentary transactions. In the later Middle Ages leasehold interests did become articles of commerce, and, as has been seen, a different set of rules developed as to them. The mediaeval reason for restraining alienation of estates in fee was to keep land in the family. This type of restraint was not permitted. The mediaeval reason for restraining alienation of leasehold interests was to protect reversioners and remaindermen against waste. This type of restraint, imposed largely for commercial reasons, was permitted. In modern times land has become an article of commerce and a new reason for restraining alienation of estates in fee, to protect the character of a neighborhood, has appeared. But the law as to restraints on estates of inheritance had become too well settled for change, and the old rules, developed when land was not a commercial commodity, were applied to a new situation. Chattels, on the other hand, have always been articles of commerce, and rules governing restraints on their alienation did not become fixed during the mediaeval period. The mediaeval rules governing donative and testamentary dispositions of land may be followed as to like dispositions of chattels, but we cannot be certain that they are applicable to commercial transactions involving chattels. Certainly there are substantial differences in the considerations of policy which affect the two types of transactions.

A third major difference between the law of restraints on alienation of land and that of restraints on alienation of chattels should be noted. The law as to land developed fully centuries ago; that as to chattels is relatively modern, incomplete, and rapidly developing. The rules as to land were developed in connection with the doctrine of estates and became fixed in the mediaeval period, when status was dominant. Indeed, the very

word "estate" is a variant of "status."⁴²⁴ English law knows no estates in chattels, and the rules governing restraint on their alienation, so far as there are any, were developed in an era when the concept of contract was dominant; when courts were impatient with the fixed and arbitrary rules of the mediaeval common law and anxious to enforce the intention of parties to contracts so long as they did not contravene current concepts of public policy. The era of *laissez faire* has waned.⁴²⁵ We have entered upon a new era of status, of fixed and arbitrary rules imposed by government fiat. It seems probable that the law of restraints on alienation of chattels will complete its development in a setting of strict government regulation of property, business, and human relationships. Already legislative and administrative restrictions have an important place in the field. Very likely there will eventually be rules as to restraints on alienation of chattels as complete, precise, and strict as those which relate to land. We cannot predict their exact nature, but we can be reasonably sure that, insofar as commercial transactions are concerned, they will not be the same rules which the judges of the Plantagenet period developed as to restraints on alienation of land.

⁴²⁴ Pollock & Maitland, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 11 (1895); Turner, *THE EQUITY OF REDEMPTION* 1-3 (1931). It should be borne in mind, too, that the legislative declaration [stat. *Quia Emptores Terrarum*, 18 Edw. I, stat. 1, c. 1 (1290)] that estates in fee simple were alienable and the judicial declaration [Taltarum's Case, Y.B. 12 Edw. IV, Mich., pl. 25 (1472), note 67 *supra*] that entails were barrable were the results of socio-economic conflicts in which powerful interests were opposed to alienability. The general alienability of chattels has never been questioned or opposed and there has never been a problem of preventing potent economic forces from making chattels generally inalienable.

⁴²⁵ Keynes, *THE END OF LAISSEZ-FAIRE* (1926).

B. DONATIVE AND TESTAMENTARY TRANSACTIONS

In England the impossibility of inter vivos creation of interests in expectancy in chattels and the unsuitability for the purpose of the devices of bailment and contract have tended to restrict attempts to restrain the alienation of chattels to the trust device and provisions in wills for forfeiture on alienation. The possibilities of the trust will be explored with restraints on equitable interests. In connection with a bequest of the use and occupation of chattels for life or a term of years, the English courts would probably sustain the validity of a provision for forfeiture on alienation by way of executory bequest to another.⁴²⁶ They have held such a provision void when attached to a bequest of the general property in chattels.⁴²⁷ As to testamentary restraints, then, the English law of chattels appears to follow that of land.

Probably because of misinterpretation of a passage in Blackstone's *Commentaries*,⁴²⁸ most American courts have tended to assume that interests in expectancy in chattels, of the types permissible in land, can be created

⁴²⁶ This is the rule as to life interests in chattels bequeathed in trust. The cases are collected in Gray, *RESTRAINTS ON ALIENATION*, 2d ed., §78 (1895). In England the rules governing restraints on alienation of equitable interests tend to follow those which apply to equivalent legal interests.

⁴²⁷ *Bradley v. Peixoto*, 3 Ves. Jr. 324, 30 Eng. Rep. 1034 (1797); *Rishton v. Cobb*, 5 Myl. & Cr. 145, 41 Eng. Rep. 326 (1839). In *Powell v. Boggis*, 35 Beav. 535, 55 Eng. Rep. 1004 (1866) there was a bequest of corporate stock to a sister for life, then to be sold by the executors and the proceeds divided among nephews and nieces. A provision of the will that the legacy of any nephew or niece should be forfeited if he alienated his interest before distribution was held to be a void restraint on alienation.

⁴²⁸ "If a man either by deed or will limits his books or furniture to A for life, with remainder over to B, this remainder is good." 2 *COMMENTARIES* *398; see 7 Holdsworth, *HISTORY OF ENGLISH LAW* 471 (1926). Professor Bordwell has suggested that Blackstone probably had a *deed of trust* in mind. "Interests in Chattels Real and Personal," 1 *Mo. L. Rev.* 119 at 141 (1936).

by deed as well as by will.⁴²⁹ There is substantial authority in this country for the validity of legal interests in non-consumable chattels which correspond to the reversion, the remainder, the shifting use, and the shifting executory devise in land.⁴³⁰ It has been suggested that interests analogous to the possibility of reverter and the right of entry on breach of condition subsequent are possible.⁴³¹ In the setting of this development the American writers have maintained and such decisions as there are tend to confirm the view that the rules governing the validity of prohibitions and provisions for forfeiture on alienation of legal interests in chattels are the same as those which apply to similar restraints on alienation of estates in land of like duration.⁴³² For this purpose,

⁴²⁹ Gray, *RULE AGAINST PERPETUITIES*, 3d ed., §§88-98 (1915) Bordwell, "Interests in Chattels Real and Personal," 1 *MO. L. REV.* 119 at 141-144 (1936); Simes, "Future Interests in Chattels Personal," 39 *YALE L.J.* 771-803 (1930).

⁴³⁰ The cases are collected in Simes, "Future Interests in Chattels Personal," 39 *YALE L.J.* 771 at 783-785 (1930). The validity of future interests in personalty corresponding to remainders, created by will, was recognized in *Glover v. Reid*, 80 Mich. 228, 45 N.W. 91 (1890); *Michigan Trust Co. v. Hertzog*, 133 Mich. 513, 95 N.W. 531 (1903); *Sellick v. Sellick*, 207 Mich. 194, 173 N.W. 609 (1919), and *Hankey v. French*, 281 Mich. 454, 275 N.W. 206 (1937). A transfer of corporate stock, reserving a life interest, which is really a conveyance of a springing executory interest in personalty, was held valid in *Bloodgood v. Terry*, 134 Mich. 305, 96 N.W. 446 (1903). See Part Two, note 167 *infra*.

⁴³¹ Simes, "Future Interests in Chattels Personal," 39 *YALE L.J.* 771 at 785-787 (1930); 2 Schouler, *TREATISE ON THE LAW OF PERSONAL PROPERTY*, 3rd ed., §309 (1896); see Gray, *RULE AGAINST PERPETUITIES* §78. See *Gamble v. Gates*, 92 Mich. 510, 52 N.W. 941 (1892).

⁴³² Gray, *RESTRAINTS ON ALIENATION*, 2d ed., §§27, 28, 78, 105, 134 (1895); 2 Simes, *FUTURE INTERESTS* §§446, 447, 456, 457, 463, 465 (1936); Schnebly, "Restraints Upon the Alienation of Property," 6 *AMERICAN LAW OF PROPERTY*, §26.18 (1952). The articles of Professor Schnebly ["Restraints Upon the Alienation of Legal Interests," 44 *YALE L.J.* 961-995, 1186-1215, 1380-1408 (1935)] and Mr. Manning ["The Development of Restraints on Alienation Since Gray," 48 *HARV. L. REV.* 376-406 (1935)] do not discuss the law of chattels personal. The *RESTATEMENT OF PROPERTY* does not discuss restraints on alienation of chattels personal, saying, "The problems thereby raised and the considerations which enter into their solution are to

the general property in a chattel is assimilated to an estate in fee simple in land, a treatment suggested by the passage from Coke quoted at the beginning of this section.⁴³³

*State v. Dunbar Estate*⁴³⁴ was a claim against the guardian of a lunatic for the cost of the ward's care in an asylum. The only assets in the hands of the guardian were funds bequeathed to the ward by a will which provided,

"I direct that income and principal also shall be received by all beneficiaries free and clear of their debts, contracts, anticipations, and alienations, and of all liability for or by reason of the same, and from all levies, attachments and executions. Payments must be made either directly to the beneficiaries, or upon their respective orders, signed not more than three months beforehand."

A judgment allowing the claim was affirmed, the court saying,

"We do not think the language open to the construction that, after the fund had in fact come into the hands of the legatee, it should not be liable for his subsequent engagements."⁴³⁵

*Abrey v. Duffield*⁴³⁶ was a suit to construe a will, a codicil to which provided that, "my son Thomas is to have the use and possession of [a piano] during his life, but that the same is not to be disposed of by him." The validity of this restraint on alienation was not decided or discussed.

such an extent different, in a state of flux and subjected to statutory provisions, that it is undesirable to treat them. . . ." Div. IV, Part II, Introductory Note.

⁴³³ Note 402 *supra*.

⁴³⁴ 99 Mich. 99, 57 N.W. 1103 (1894).

⁴³⁵ 99 Mich. 104-105, 57 N.W. 1104.

⁴³⁶ 149 Mich. 248, 112 N.W. 936 (1907).

Turnbull v. Johnson ⁴³⁷ was a suit to rescind for fraud a sale of corporate stock. The stock, with other property, had been bequeathed to the testator's widow, "to be hers absolutely during her lifetime, and at her death what of the same might be left to my two sons, . . . , share and share alike, and their heirs forever." The widow, the sons, and a bank to which the stock had been pledged assigned the stock to the defendant. The sons brought suit, claiming that their joinder in the assignment had been procured by fraud. A decree for the defendant was affirmed on the general ground the will operated to place the entire title to the stock in the widow, so that the sons had no interest in it. The court cited *Jones v. Jones* ⁴³⁸ and some of the line of cases following it which hold, in effect, that a gift over on failure of the first taker to alienate inter vivos is repugnant to a grant or devise in fee simple because it is a restraint on testation and intestate descent.⁴³⁹ The decision in *Turnbull v. Johnson* follows what is probably the general rule in this country, that an executory bequest over on failure of a legatee of the entire title to personalty to alienate inter vivos is void as a restraint on testation and intestate distribution.⁴⁴⁰

Wessborg v. Merrill ⁴⁴¹ was an appeal from a probate order of distribution. The testator bequeathed corporate stock to three trustees to pay the income to his wife and five children "and to their respective heirs, share and share alike," until August 11, 1914. The will provided,

⁴³⁷ 153 Mich. 228, 116 N.W. 1009 (1908).

⁴³⁸ 25 Mich. 401 (1872), note 181 *supra*.

⁴³⁹ Note 182 *supra*. *Glover v. Reid*, 80 Mich. 228, 45 N.W. 91 (1890), which involved personalty, held such a gift over valid where the first taker was given only a life interest with a limited power of disposition inter vivos.

⁴⁴⁰ Gray, RESTRAINTS ON ALIENATION, 2d ed., §56a; *cf.* §65 (1895). Annotation, 17 A.L.R. (2d) 7-227 (1951).

⁴⁴¹ 195 Mich. 556, 162 N.W. 102 (1917).

"After August 11, 1914, the stock shall be equally divided among them . . . , and each may dispose of his or her own stock at will, under this condition, however, that the stock shall be sold to one of their own number, to keep it in the family, providing the price obtained is as good as any outsider will give."

One of the daughters died in 1913, bequeathing her estate to the respondent in trust. The probate order, which distributed a child's share in the stock to the respondent, was affirmed without comment on the validity of the restraint on alienation. Inasmuch as the respondent was not one of the children, the effect of the decision was to hold the restraint inoperative as to a disposition by will. The restraint was, in effect, a pre-emptive option which, in the case of land, would seem to be valid under Michigan law despite the fact that it was perpetual and so, under the law of most jurisdictions, in violation of the Rule Against Perpetuities.⁴⁴²

*Hankey v. French*⁴⁴³ was a suit to construe a will. Testator bequeathed to his wife,

"the use and income of my share or interest in the business of R. T. French & Sons, wheresoever conducted, provided, however, that my interest in said business is not to be sold or disposed of, but that the business is to be continued and that my share of the profits arising from the conduct of said business is to be paid to my wife, . . . , so long as she shall remain my widow.

"Paragraph 3. I give, devise and bequeath to my children, . . . , in equal shares, my interest in the partnership of R. T. French & Sons, after the death of my wife, . . . , or in the event of her remarriage, and I do further especially direct that my interest in the partner-

⁴⁴² *Windiate v. Leland*, 246 Mich. 659, 225 N.W. 620 (1929); notes 230, 231 *supra*.

⁴⁴³ 281 Mich. 454, 275 N.W. 206 (1937).

ship of R. T. French & Sons shall not be sold or disposed of during the minority of either of my said sons."

The circuit court held that the interest in the partnership, which owned land, was personalty, that the restraints on alienation imposed by the second and third paragraphs of the will were void,⁴⁴⁴ and that the bequest was adeemed by a change in the partnership which occurred between the date of the will and the death of the testator. There was no appeal from the first two conclusions. The decree was reversed and a decree ordered in "accordance with the quoted language of the will," the Supreme Court holding that there had been no ademption. The opinion does not discuss the validity of either restraint on alienation, but, in view of the nature of a chancery appeal, the decision is probably some authority for the proposition that a prohibition on alienation in a bequest of personalty is void, both as to a life interest and as to a succeeding interest in the nature of a remainder in fee.

The authorities are scanty but, such as they are, they indicate that, in donative and testamentary transactions, Michigan tends to apply to restraints on alienation of interests in chattels personal the rules which govern the validity of similar restraints on estates in land of like duration. If so, it may be assumed that all prohibitory restraints, those which would compel the owner of a legal interest in a chattel to remain owner in spite of his attempt to transfer it, are void. Penalty restraints by way of forfeiture on alienation are void if attached to a gift or bequest of the otherwise absolute general prop-

⁴⁴⁴ The Supreme Court opinion indicates that the decree below held only the restraint imposed by paragraph 3 void. 281 Mich. 454 at 459. The actual decree of the circuit court, however, determined that the restraints imposed by paragraphs 2 and 3 were both void. Record, p. 29.

erty in chattels. Penalty restraints on a bequest of an interest in chattels for life or years, by way of a provision for an executory bequest to another in the event of alienation, are probably valid. A provision in a gratuitous bailment for life or a term of years that the bailor may treat the bailment as terminated and retake possession if the bailee transfers his interest to another is almost certainly valid.⁴⁴⁵ Whether a provision in a gratuitous bailment for forfeiture on alienation to someone other than the bailor would be valid is highly doubtful, in view of the lack of authority for the creation of future interests in chattels by transactions *inter vivos*.

C. COMMERCIAL TRANSACTIONS

The interest of a bailee of chattels under a pawn or under that type of hiring known in the Roman law as *locatio rei*⁴⁴⁶ corresponds to the interest of a lessee of land for life or years. In the thirteenth century the lease of land was commonly given as security for money lent, thus serving the same purpose as the pawn.⁴⁴⁷ The similarity between a demise of land to be used for commercial operations of the lessee and the demise of a ship for like use is evident. At the beginning of that century the interests of the lessee of land and the bailee of chattels were treated much alike, primarily as personal contract rights against the lessor or bailor rather than as interests in property *in rem*.⁴⁴⁸ Although estates for years in land remained personal property, the development of remedies for their specific enforcement and their use in

⁴⁴⁵ See *Bringloe v. Morrice*, 1 Mod. 210, 86 Eng. Rep. 834 (1675).

⁴⁴⁶ For the classification of bailments see *Coggs v. Bernard*, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1703); Story, *LAW OF BAILMENTS*, 9th ed., §§3-9 (1878).

⁴⁴⁷ 3 Holdsworth, *HISTORY OF ENGLISH LAW*, 3d ed., 215 (1923).

⁴⁴⁸ *Id.* at 213, 336-351.

donative and testamentary transactions tended toward their treatment more as property than as personal contract rights. The bailment, on the other hand, has remained a topic of the law of contract and tort, more an aspect of commercial law than that of property. Hence, whereas the interest of the lessee for life or years is *prima facie* alienable,⁴⁴⁹ the interest of the bailee is treated as personal to himself and inalienable in most cases, even when his interest is not terminable at the will of the bailor.⁴⁵⁰

The general rule that the interest of a bailee is inalienable has some exceptions. The pawnee may transfer his interest in the pawn with an assignment of the debt.⁴⁵¹ Although the English view is that the interest of a bailee who has a common-law artisan's lien is inalienable,⁴⁵² some American states, including Michigan, permit such a bailee to assign the lien with his claim against the bailor.⁴⁵³ The interest of a hirer under a hire-purchase contract is assignable,⁴⁵⁴ as is that of a purchaser under a conditional sale contract.⁴⁵⁵ Assignments and subcharters

⁴⁴⁹ Notes 236, 291, 292 *supra*.

⁴⁵⁰ Story, BAILMENTS §234; 1 Williston, SALES OF GOODS, 2d ed., 332 (1924).

⁴⁵¹ *Mores v. Conham*, Owen 123, 74 Eng. Rep. 946 (1609); *Donald v. Suckling*, L.R. 1 Q.B. 585 (1866); *Drake v. Cloonan*, 99 Mich. 121, 57 N.W. 1098 (1894); other American cases are collected in Brown, PERSONAL PROPERTY 579n (1936).

⁴⁵² *Legg v. Evans*, 6 M. & W. 36, 151 Eng. Rep. 311 (1840).

⁴⁵³ *Gardner v. Le Fevre*, 180 Mich. 219, 146 N.W. 653 (1914). Other cases are collected in Brown, PERSONAL PROPERTY 534n (1936).

⁴⁵⁴ *Whiteley, Ltd. v. Hilt*, [1918] 2 K.B. 808 (C.A.). This is assumed by the Hire-Purchase Act, 1 & 2 Geo. VI, c. 53, §21 (1938).

⁴⁵⁵ The cases are collected in 1 Williston, SALES §332n (1924). Hoar, CONDITIONAL SALES 59, 345 (1937). As to the right of possession of a chattel mortgagor, see *Cadwell v. Pray*, 41 Mich. 307, 2 N.W. 52 (1879); *Daggett, Bassett & Hills Co. v. McClintock*, 56 Mich. 51, 22 N.W. 105 (1885). In Michigan, however, it is dangerous for a chattel mortgagor or conditional sale contract vendee to assign his interest. Act 328, P.A. 1931, §175, Mich. Stat. Ann. §28.374, Comp. Laws (1948) §750.177, provides: "Any person who shall . . . dispose of any personal

are common in connection with the demise of ships.⁴⁵⁶ Normally the bailee under a fixed-term bailment or bailment lease may transfer his interest.⁴⁵⁷

The theory of the cases holding the interest of the bailee under some types of bailment alienable is that, in those situations, the element of personal trust is not so prominent as in the ordinary bailment relationship. Even in such situations, the terms of the bailment may indicate that personal trust is intended. Hence, the text-writers assert that the terms of a bailment under which the bailee's interest would otherwise be alienable may validly restrain alienation by providing that alienation by the bailee will terminate the bailment and entitle the bailor to immediate possession.⁴⁵⁸ This is closely analogous to a provision for forfeiture on alienation in a lease of land for life or years, inserted for the protection of the reversioner. It would seem, therefore, that the law of restraints on alienation of the bailee's interest in a chat-

property held by him subject to any chattel mortgage or written instrument intended to operate as a chattel mortgage, or any lease or written instrument intended to operate as a lease, or any contract to purchase not yet fulfilled with intent to injure or defraud the mortgagee, lessor or vendor under such contract or any assignee thereof, shall . . . be guilty of a felony." It has been held under this statute that mere proof of a sale raises a presumption of intent to defraud. *Bowen v. Borland*, 257 Mich. 306, 241 N.W. 201 (1932). As the word "injure" might mean mere inconvenience, the lessee or conditional vendee of chattels assumes a serious risk in transferring his interest.
⁴⁵⁶ E.g., *Rutherford, Sender & Co. v. Goldthorpe, Scott & Wright, Ltd.* [1922] 1 K.B. 508.

⁴⁵⁷ *Dean v. Whittaker*, 1 Car. & P. 347, 171 Eng. Rep. 1225 (1824); *Duffell v. Spottiswoode*, 3 Car. & P. 435, 172 Eng. Rep. 490 (1828); *Goddard*, *OUTLINES OF THE LAW OF BAILMENTS AND CARRIERS*, 2d ed., §120 (1928); *Story*, *COMMENTARIES ON THE LAW OF BAILMENTS*, 9th ed., §§324, 413n (1878); see *Legg v. Evans*, 6 M. & W. 36, 151 Eng. Rep. 311 (1840); *Donald v. Suckling*, L.R. 1 Q.B. 585 (1866).

⁴⁵⁸ 1 Halsbury, *LAW OF ENGLAND* 555 (1907); *Pereira*, *LAW OF HIRE AND HIRE-PURCHASE* 120 (1939); *Brown*, *PERSONAL PROPERTY* 579n (1936). The Hire-Purchase Act, 1 & 2 Geo. VI, c. 53, §7 (1938) and the Uniform Conditional Sales Act, §13, assume the validity of such provisions. See *Whitney v. McConnell*, 29 Mich. 12 (1874).

tel is in general accord with the law as to restraints on estates in land of like duration. Unlike the case of land, however, it is probable that the provision for forfeiture must be in favor of the bailor; the bailee's interest probably cannot be made to shift to a third party on alienation.

Commercial sales in the early Middle Ages were normally direct transactions between producer and consumer. The farmer brought his produce to market and sold to the town housewife. The artisan sold his manufactures in his own shop or the local market to purchasers who bought for personal use. In this setting the Mediaeval Church developed its doctrine of just price, which applied to both prices and wages. Under this doctrine the just price was, in general, the actual cost of production plus an amount sufficient to enable the producer to maintain himself and his family in the customary manner of persons of his status; the just wage was an amount sufficient to enable the laborer to maintain himself and his family according to his status. The just price did not fluctuate with supply and demand. For the seller to raise prices because of scarcity was to make an unearned and immoral profit. For the buyer to seek a lower price because of a glut on the market was to take an unfair advantage of the producer. For the laborer to ask higher wages because of a shortage of labor or because the product of his labor was more valuable than that of other persons of like status was wrongful. Thus the doctrine tended to condemn competition and all profits and wages which were more than the amount necessary for the subsistence of the producer or laborer according to the fixed customs of his social status.⁴⁵⁹

⁴⁵⁹ Cunningham, *GROWTH OF ENGLISH INDUSTRY AND COMMERCE DURING THE EARLY AND MIDDLE AGES*, 6th ed., 461 (1915); O'Brien, *AN*

The theory of this early period had no place for the trader, the person who purchased goods for resale, whether wholesaler or retailer. With the growth of towns and the expansion of foreign commerce in the later Middle Ages, however, the necessity and value of the labor of those who provided transportation and storage of goods received grudging ecclesiastical recognition. Trade was still regarded as fraught with temptation to sin, however, and the wholesaler was looked upon with particular suspicion. Resale by traders was governed by the doctrine of just price. The resale price should be the cost price plus the actual cost of transportation, storage, or labor performed in improving the goods, plus an amount sufficient to enable the trader to maintain himself and his family in the manner customary to persons of his status. Speculative trading, purchasing with a view to deriving profit from an advance in the market price, was improper in all circumstances.⁴⁶⁰

Corollary to the doctrine of just price was a doctrine that the parties to sales, because of ignorance and the temptation to seek an unjust profit, were ordinarily unfit to fix the just price with accuracy. Hence prices, wages, the quality of goods and the details of commerce should be prescribed by public authority and enforced by governmental agencies.⁴⁶¹

ESSAY ON MEDIAEVAL ECONOMIC TEACHING 102-106, 109-123 (1920). Dr. O'Brien suggests that, in some circumstances, elements other than the cost of production and the labor of the producer might enter into the computation of the just price, but these two elements were dominant in the process, pp. 112-120. Tawney, RELIGION AND THE RISE OF CAPITALISM, 1950 ed., 27-28, 35, 38.

⁴⁶⁰ O'Brien, AN ESSAY ON MEDIAEVAL ECONOMIC TEACHING 144-151, 152-155 (1920). It should be noted that, as an aspect of the prohibition of usury, the price in a credit sale was not allowed to be larger than in a cash transaction and, of course, the seller might not charge interest on the unpaid balance. *Id.* at 119. Tawney, RELIGION AND THE RISE OF CAPITALISM, 1950 ed., 37-38.

⁴⁶¹ O'Brien, AN ESSAY ON MEDIAEVAL ECONOMIC TEACHING 106-109 (1920); Tawney, RELIGION AND THE RISE OF CAPITALISM, 1950 ed., 41-42.

Mediaeval English law reflects the doctrine of just price and its corollary. From Norman to Tudor times prices, wages, quality of goods, the training of artisans, and the most minute details of commercial activity were strictly regulated to eliminate competition, "unjust" prices, and unearned profits. Some of this regulation was done by the central government directly, through statutes, orders in council, and royal proclamations. Most of it was delegated to chartered companies, boroughs and markets, which exercised their powers under the supervision of the central government. Competition was eliminated in many fields by the grant of monopolies to individuals or chartered companies.⁴⁶² Evasion of local regulations and speculation in commodities were forbidden by drastic provisions of the criminal law which denounced as "forestalling" purchasing or contracting to purchase merchandise en route to any city, port, market, or fair from inland or overseas, and attempts to raise the prices or encourage the withholding from sale of such merchandise.⁴⁶³ This operated to confine trading to areas where regulation could be effective.

The Reformation weakened the influence of the Roman Catholic doctrine of just price, but it did not result in any relaxation of government controls of commerce. Instead, they became more extensive and better en-

⁴⁶² 2 Holdsworth, *HISTORY OF ENGLISH LAW* 314-387 (1924); 1 Cunningham, *GROWTH OF ENGLISH INDUSTRY AND COMMERCE IN MODERN TIMES*, 4th ed., 285-308 (1907); Bindoff, *TUDOR ENGLAND*, 288-289, 305-306 (1950).

⁴⁶³ Stat. 51 Hen. III, stat. 6, c. 3, §5 (1266); 25 Edw. III, stat. 4, c. 3 (1350); confirmed by 2 Ric. II, stat. 1, c. 2 (1378); explained by 5 & 6 Edw. VI, c. 14, §1 (1552). The statute of 51 Hen. III forbade purchase at a market before it opened. This suggests the primary purpose of these penal statutes: to confine trading to public markets where it could be regulated effectively. The mediaeval authorities were trying to eliminate "under the counter" sales. There were other statutes on the subject. Herbruck, "Forestalling, Regrating and Engrossing," 27 *MICH. L. REV.* 365-376 (1929).

forced. In the Tudor, Stuart, and Hanoverian periods, the motive of regulation ceased to be the enforcement of just prices and the elimination of unjust profits and became that of the mercantile system, the enhancement of the power, prestige, and wealth of the national state in peace and war. The new regulation permitted large profits when they served to encourage the growth of industries deemed desirable. It did not, however, tolerate profiteering in food.⁴⁶⁴ By a statute of Henry VIII, the central government assumed direct control of the regulation of food prices.⁴⁶⁵ A statute of Edward VI restated the old criminal law of forestalling and prohibited "re-grating," reselling of foodstuffs purchased in a fair or market, in a fair or market held at the same place or within four miles thereof, and "ingrossing," which the statute declared was committed when any person or persons,

"get into his or their hands, by buying, contracting or promise-taking, other than by demise, grant, or lease of land or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of England, to the intent to sell the same again."⁴⁶⁶

Sir Edward Coke thought that the quoted language was only designed to prohibit resale in gross and did not prevent purchase of foodstuffs for resale at retail,⁴⁶⁷ but

⁴⁶⁴ Note 462 *supra*; Cunningham, GROWTH OF ENGLISH INDUSTRY AND COMMERCE DURING THE EARLY AND MIDDLE AGES, 6th ed., 470-472, 481-483 (1915); Tawney, RELIGION AND THE RISE OF CAPITALISM, 1950 ed., cc. II, III, IV.

⁴⁶⁵ Stat. 25 Hen. VIII, c. 2 (1533). This act did not abolish local price regulation but authorized price-fixing by the Council when local regulation was inadequate. For the operation of the price and wage regulation systems under Elizabeth, see Cunningham, GROWTH OF ENGLISH INDUSTRY AND COMMERCE IN MODERN TIMES, 6th ed., 25-36, 85-99 (1919).

⁴⁶⁶ Stat. 5 & 6 Edw. VI, c. 14, §§2, 3 (1552).

⁴⁶⁷ 3 INSTITUTES, *195-196. Sheppard, GRAND ABRIDGEMENT, Part II, 226-227 (1675) is positive on this point, stating that resale at retail

the broad language of the statute appears to condemn the whole business of trading in groceries, wholesale and retail alike. In 1620 a grocer was prosecuted for buying twenty quarters of wheat, making it into starch, and selling the starch to several persons. The Court of King's Bench held that this was not a violation of the statute, which tends to confirm Coke's view.⁴⁶⁸ However, prosecutions under the statute were begun against ordinary retailers of butter and cheese who sold in the normal course of business.⁴⁶⁹ A statute of 1623 declares that the statute of Edward VI made "no proviso" for retailers, that they had been troubled by prosecutions under it, and provides that it shall not prevent licensed cheesemongers from retailing butter and cheese in London.⁴⁷⁰

After the Restoration, the central government ceased to enforce or supervise the enforcement of regulations governing prices, wages, and the quality of goods. Local regulatory bodies tended to relax or break down en-

was ingrossing if, but only if, the resale price was unreasonable. The first statutory use of the term "ingross" seems to have been in 37 Edw. III, c. 5 (1363), which complains "that the merchants, called grocers, do ingross all manner of merchandise vendible; and suddenly do enhance the price of such merchandise within the realm, putting to sale by covin and ordinance made betwixt them, called the fraternity and gild of merchants, the merchandises, which be most dear, and keep in store the other, till the time that dearth or scarcity be of the same. . . ." This suggests that the offense was hoarding with a view to making an unjust profit on resale; not the mere business of engaging in the wholesale or retail grocery trade.

⁴⁶⁸ *Davison v. Culier*, J. Bridg. 5, 123 Eng. Rep. 1160 (1620). Similar decisions are collected in Herbruck, "Forestalling, Regrating and Engrossing," 27 MICH. L. REV. 365 at 378n (1929).

⁴⁶⁹ E.g. *Bedoe v. Alpe*, W. Jones 156, 82 Eng. Rep. 83 (1622). The vague language of the statute worked a serious hardship on legitimate merchants because the mode of enforcement was by *qui tam* actions brought by mercenary informers. It was probably cheaper to buy off these informers than to defend even groundless prosecutions.

⁴⁷⁰ Stat. 21 Jac. I, c. 22 (1623). This statute also freed London retailers from the inhibitions of Stat. 3 & 4 Edw. VI, c. 21 (1549) which explicitly forbade wholesale dealing in butter and cheese and restricted retail sales to quantities not in excess of a waye of cheese or a barrel of butter.

tirely. There was little to prevent speculators from making large profits through resale of commodities except the occasional activities of informers who brought *qui tam* actions for penalties under the old statutes.⁴⁷¹ The statute of Edward VI was repealed in 1772,⁴⁷² but as late as 1800 a person was convicted of ingrossing by buying a fifth of the hops on sale at Worcester Market with a view to resale when the price went up.⁴⁷³ The court held that the repeal of the statute did not abolish the common-law crime of ingrossing and rejected the contention of the defendant's counsel that there could not be a conviction without proof of intent to resell in gross, that is, wholesale.

The writings of the Physiocratic School in France and of the English economists Adam Smith and David Ricardo effected a profound change in the general attitude toward commerce and resulted by 1846 in a revolution in British policy. The new view was that prosperity could best be served by removing all restrictions from industry and trade, by allowing prices and wages to be

⁴⁷¹ Cunningham, *GROWTH OF ENGLISH INDUSTRY AND COMMERCE IN MODERN TIMES*, 6th ed., 202-206 (1919).

⁴⁷² Stat. 12 Geo. III, c. 71 (1772). This also repealed Stat. 3 & 4 Edw. VI, c. 21 (1549), note 470 *supra*.

⁴⁷³ *The King v. Waddington*, 1 East 143, 102 Eng. Rep. 56 (1800). Lord Kenyon's opinion states that he had read Adam Smith's *Wealth of Nations* to inform himself on the economic problems involved but was not convinced of the advantages of unregulated trade. 1 East 157, 102 Eng. Rep. 62. Senator Benjamin thought that the crime was committed only when the purchase was of large quantities [*TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY*, 7th ed., 530 (1931)] but the butter and cheese cases throw some doubt on this. The opinions in *The King v. Waddington* do indicate, however, that the evil of the offense lay in the tendency to enhance prices. Compare 3 Coke, *INSTITUTES*, *195-196. This definition of the evil accords with the language of a statute of Henry III or Edward I. 1 Stat. of the Realm, 203-204; Herbruck, "Forestalling, Regrating and Engrossing," 27 MICH. L. REV. 365 at 374-375 (1929). Theoretically market manipulations could not enhance prices fixed by law, but mediaeval regulators, like modern ones, had troubles with the "black market."

fixed by supply and demand, by the enlightened self-interest of the individuals concerned in free and unregulated competition. Under it, competition was seen as a public good instead of an evil to be suppressed by elaborate regulation. The old statutes fixing wages and prices, regulating the quality of goods, limiting by licensing the persons who could engage in trades, and prohibiting unjust profits, were repealed. The crimes of forestalling, regrating, and engrossing were abolished.⁴⁷⁴ The era of *laissez faire* had begun; for the first time individuals were free to fix prices, wages, and the terms of commercial transactions by private contract, subject only to newly developed doctrines that contracts must not be in restraint of trade.

The term "restraint of trade" was not new, but it acquired a wholly new meaning. Cases decided as early as the fifteenth century had declared that all contracts in restraint of trade were contrary to public policy and void.⁴⁷⁵ But those cases were decided in an era when wages, prices, quality of goods, the right to engage in trade, and the terms of commercial transactions were governed by minute regulations. These regulations left

⁴⁷⁴ Stats. 3 Geo. IV, c. 41 (1822); 5 Geo. IV, c. 66 (1824); 5 Geo. IV, c. 95 (1824); 7 & 8 Vict., c. 24 (1844). The list of statutes repealed by the last act gives some indication of the elaborateness of the mediaeval and mercantile systems of regulation. See Herbruck, "Forestalling, Regrating and Engrossing," 27 MICH. L. REV. 365 (1929).

⁴⁷⁵ Dyers' Case, Y.B. 2 Hen. V, Pasch., pl. 26 (1415); Colgate v. Bachelor, Cro. Eliz. 872, 78 Eng. Rep. 1097 (1601); Ipswich Tailors' Case, 11 Co. Rep. 53a, 77 Eng. Rep. 1218 (1614). In a period when the Crown was granting patents of absolute monopoly of the manufacture and sale of common commodities to court favorites who were not businessmen at all, for the sole purpose of permitting the patentees to make enormous profits out of licensing such manufacture and sale, the word "monopoly" also had a meaning quite different from the current use of the term. See The Case of Monopolies, 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (1602); 4 Holdsworth, HISTORY OF ENGLISH LAW 349-353 (1924); Formoy, HISTORICAL FOUNDATIONS OF MODERN COMPANY LAW 11-16 (1923).

virtually no sphere of operation for private commercial contracts; such a contract was in "restraint of trade" if it attempted to vary the applicable regulations. It was void for the same reason that private contracts purporting to fix prices or rents higher than those set by the American war time price and rent control regulations were void. The whole mediaeval system was designed to prevent competition; hence a contract designed to foster competition was void. Under the new system of *laissez faire*, free competition was looked upon as an important object of public policy. In its new sense, "restraint of trade" means restraint of competition. This radical change in the meaning of the term must be borne in mind in the use of old authorities on the subject. Moreover, the old cases involved contracts by skilled artisans not to engage in their trades. In an era when the right to engage in a skilled trade involved seven years' apprenticeship and membership in a local guild, enforcement of such a contract meant a change of status for the artisan. In the mediaeval view, everyone was born to his status, and the policy of the law was to keep him in it. The doctrine of just price, allowing the producer exactly enough profit to enable him to maintain his status, tended toward this end by preventing the seller of goods from rising above or falling below his fixed status. In this view, a contract in "restraint of trade" was objectionable because it was an attempt to change hereditary status by contract. It is strange that nineteenth century judges who admired the heroes of Horatio Alger should have applied precedents based on such principles to invalidate contracts regulating resale of goods.

The reign of *laissez faire* in England lasted for about a century, the period between the end of the Napoleonic

wars and the beginning of World War I and the longest period during which Europe has been free of general wars. Since then there has been increasing governmental regulation of wages, prices, and the terms of commercial transactions. The current tendency is toward government ownership of industry. Freedom of private contract in commercial transactions had a brief existence, and it is not surprising that the law governing the extent to which restraints may be placed on resale of chattels by that means has not attained complete development. It has attained some development, and that development merits examination.

The growth of the practices of marketing commodities under brand names and of advertising the merits of these products in media of wide circulation creates in the manufacturer of such a product a strong economic interest in controlling its resale for the protection of the good will achieved by the brand name. To ensure that his product is effectively marketed throughout the country he is likely to wish to allot areas for resale to wholesalers and retailers. He has an interest in seeing that the public everywhere can depend upon his product being marketed in quantities and quality which are uniform and consistent with his advertising. He has an interest in controlling resale prices, both to enhance the effectiveness of his advertising and to prevent seriously adverse effects on his whole scheme of distribution. If one druggist in a community sells Dr. Galen's Kidney Pills at a price below wholesale cost with a view to inducing customers to come to his store and buy other goods, the other druggists in the community cannot afford to sell them at all and will persuade their customers to buy a substitute, with the result, in the long run, that much of the value of the manufacturer's advertising is lost.

The manufacturer may, of course, control all this by retailing his own product, but this is scarcely feasible for the manufacturer of a single drug or a few types of canned foods. Hence the manufacturer has an interest in binding wholesalers and retailers of his product to abide by the conditions he imposes upon resale.

English manufacturers have placed chief reliance, in their efforts to control the prices and conditions of resale of their products, on trade associations comprising all or virtually all the manufacturers and wholesalers in a given field. The Tobacco Trade Association, the Proprietary Articles Trade Association (drugs), and the Motor Trade Association are examples. The rules of these associations prohibit wholesalers from selling to retailers who have not agreed to sell only at prices fixed by the manufacturers and approved by the association. If a retailer sells in violation of the restrictions imposed upon him, his name is placed on a "stop list," and no wholesaler will sell him anything.⁴⁷⁶ Thus if a druggist attempts to sell Dr. Galen's Kidney Pills at a cut price, he will be unable to buy any drugs at all from any British wholesaler. The British courts have upheld the lawfulness of these associations and their "stop-list" device.⁴⁷⁷

The trade association device is not always available and effective. The manufacturer may wish to seek enforcement in the courts of direct contracts with retailers regu-

⁴⁷⁶ DIX, *LAW RELATIVE TO COMPETITIVE TRADING* 83-109 (1938); *REPORT OF THE COMMITTEE ON RESALE PRICE MAINTENANCE* (Cmd. 7696, 1949). The committee recommended that these practices be made illegal.

⁴⁷⁷ *Thorne v. Motor Trade Association*, [1937] A.C. 797. Combinations which restrict competition against the public interest may, in some cases, be prohibited or regulated by administrative bodies under the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, 11 & 12 Geo. VI, c. 66.

lating resale prices and of contracts binding wholesalers to sell only to retailers who agree to maintain the prices prescribed by the manufacturer. The British courts are willing to enforce both types of contract specifically by injunction against the contracting parties.⁴⁷⁸ There are suggestions in the opinions that such a contract might be illegal if calculated to produce a pernicious monopoly, but none seems to have been held invalid on that ground.⁴⁷⁹

Sometimes a retailer who is not a party to a price maintenance contract secures a stock of brand-name goods by deceiving a wholesaler or retailer who is a party to such a contract or through mistake or deliberate breach of contract on the part of such a party. Such a retailer might conceivably, under some circumstances, be liable to the manufacturer in tort for inducing breach of contract.⁴⁸⁰ Manufacturers have sought to bind him by their price regulations on the theory that an equitable restriction was imposed on the goods, either by the contract with the wholesaler or through notice attached to the goods. The equitable restriction on use of land was developed in the nineteenth century by extension of the rules of covenants running with the land and has been buttressed by analogies to conditions subsequent and easements.⁴⁸¹ Easements and transfers on condition subsequent are unknown in the law of chattels. Dictum in

⁴⁷⁸ *Elliman, Sons & Co. v. Carrington and Son, Ltd.*, [1901] 2 Ch. 275; *Palmolive Co., Ltd. v. Freedman*, [1928] Ch. 264 (C.A.). Enforcement will be denied if the contract is clearly unreasonable as between the parties. *Joseph Evans & Co. v. Heathcote*, [1918] 1 K.B. 418.

⁴⁷⁹ *Attorney-General v. Adelaide Steamship Co.*, [1913] A.C. 781, 795.
⁴⁸⁰ *Lumley v. Gye*, 2 E. & B. 216, 118 Eng. Rep. 749 (1853).

⁴⁸¹ *Tulk v. Moxhay*, 2 Ph. 774, 41 Eng. Rep. 1143 (1848); Clark, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND"* 149-157 (1929); *Elphinstone, COVENANTS AFFECTING LAND* 69-76 (1946); Jolly, *RESTRICTIVE COVENANTS AFFECTING LAND*, 2d ed., 1-18 (1931).

a sixteenth century case denied that covenants could run with the title to chattels as they may with the title to land.⁴⁸² In consequence, the English courts have held that ordinary chattels cannot be subjected to equitable use restrictions.⁴⁸³ Hence price maintenance schemes are not enforceable by judicial means against dealers who are not parties to contracts binding them to observe the scheme. The British courts make an exception in the case of patented articles, holding that the patent entitles the patentee to impose restrictions on their resale which run with the goods and bind every taker with notice.⁴⁸⁴

The law of commercial dealing in chattels is complicated in the United States by the fact that the Federal Constitution empowers Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, but leaves the regulation of other commerce to the states.⁴⁸⁵ Nineteenth century federal policy favored, in general, freedom of contract and freedom of competition in domestic commerce. A feeling that freedom of contract was being used to hamper free competition to an undesirable extent led to the enactment in 1890 of the Sherman Anti-Trust Act, which provided,

“Every contract, combination in the form of trust or

⁴⁸² *Spencer's Case*, 5 Co. Rep. 16a, 16b-17a, 77 Eng. Rep. 72, 74 (1583). There is another difficulty: equitable restrictions on the use of land must be appurtenant to an estate in the same or neighboring land. *Milbourn v. Lyons*, [1914] 2 Ch. 231 (C.A.); *London County Council v. Allen*, [1914] 3 K.B. 642 (C.A.); *Torbay Hotel Co. v. Jenkins*, [1927] 2 Ch. 225.

⁴⁸³ *Taddy v. Sterious*, [1904] 1 Ch. 354; *McGruther v. Pitcher*, [1904] 2 Ch. 306 (C.A.); *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.*, [1915] A.C. 847; Chafee, “Equitable Servitudes on Chattels,” 41 HARV. L. REV. 945-1013 (1928). Some contrary decisions in this country are discussed in Waite, “Public Policy and Personal Opinion,” 19 MICH. L. REV. 265-282 (1921).

⁴⁸⁴ *National Phonograph Co. v. Menck*, [1911] A.C. 336.

⁴⁸⁵ Art. I, §VIII, cl. 3; Amendment X.

otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”⁴⁸⁶

It has been suggested that the generality of the language of this act made it forbid the normal transactions of business, that “Business men now enjoy liberty only according as the prosecuting authorities indulge them in the open breach of the law.”⁴⁸⁷ In this respect the act resembles the statute of Edward VI against ingrossing which, if read literally, forbade all trade in foodstuffs.⁴⁸⁸ The interpretation of the statute in the federal courts tends to justify this criticism. The earlier federal decisions, both before and after the statute, affirmed the validity of resale price maintenance contracts and suggested that our law would follow the British.⁴⁸⁹ Then, beginning in 1907, a series of decisions of the Supreme Court and the Circuit Courts of Appeals completely reversed the rules, holding, in effect, that schemes for retail price maintenance by contract or equitable restriction are illegal at common law and under the statute and seriously curtailing even the manufacturer’s right to refuse to sell to dealers who habitually cut prices.⁴⁹⁰

⁴⁸⁶ Act July 2, 1890, §1, 26 Stat. L. 209, 15 U.S.C. (1946) 1.

⁴⁸⁷ Montague, “Business Enterprise and the Law,” 193 N. AM. REV. 694 at 704 (1910).

⁴⁸⁸ Stat. 5 & 6 Edw. VI, c. 14, §3 (1552); notes 466-470, 472 *supra*.

⁴⁸⁹ The cases are collected in Seligman and Love, PRICE CUTTING AND PRICE MAINTENANCE 43-52 (1932).

⁴⁹⁰ E.g., *John D. Park & Sons Co. v. Hartman*, (6th Cir. 1907) 153 F. 24; *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376 (1911); *United States v. Schrader's Sons*, 252 U.S. 85, 40 S.Ct. 251 (1920). Other cases are collected in Seligman and Love, PRICE CUTTING AND PRICE MAINTENANCE 52-82 (1932). This line of cases is effectively criticized in Waite, “Public Policy and Personal Opinion,” 19 MICH. L. REV. 265-282 (1921). This is not the place for an extended discussion of the intricacies of interpretation of the federal antitrust laws and related statutes. As to the special problem created by patent monopolies, see *United States v. New Wrinkle*, 342 U.S. 371, 72 S.Ct. 350 (1952).

The Miller-Tydings Amendment of 1937⁴⁹¹ inserted a proviso in the Sherman Act to the effect that contracts permitted by state law prescribing minimum prices for products sold under trade-mark or brand name should not be illegal by reason of that act or the Federal Trade Commission Act.⁴⁹² The proviso does not permit contracts between producers, between wholesalers, between retailers, or between others in competition with each other; that is, it limits them to contracts between a producer and his distributors or between a wholesaler and his retail outlets. By the end of 1936, 14 states had enacted statutes, commonly called "fair trade" laws,⁴⁹³ authorizing resale price maintenance contracts as to trade-marked and brand named goods. In 1937, 28 more states enacted such statutes, and by 1950, 45 states had such legislation in force.⁴⁹⁴ State statutes enacted in 1933 and thereafter contained a "non-signer" provision to the effect that whenever a producer has entered into a price-maintenance contract, price-cutting by anyone, whether or not a party to the contract, is actionable. The Supreme Court had held in 1936 that such a provision was valid, under the Fourteenth Amendment, as to transactions in intra-state commerce.⁴⁹⁵ It was decided in 1953 that a 1952 amendment to the Sherman and Federal Trade Commission Acts permitted the enforcement of

⁴⁹¹ Act Aug. 17, 1937, tit. VIII, 50 Stat. L. 693, 15 U.S.C. 1.

⁴⁹² Act Sept. 26, 1914, 38 Stat. L. 717, as amended, 15 U.S.C. 41, et seq.

⁴⁹³ It is of interest to note that seventeenth century smugglers who violated the trade regulations imposed under the mercantile system referred to their operations as "fair trade." Scott, GUY MANNERING, c. 4.

⁴⁹⁴ Dissenting opinion of Frankfurter, J., in *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 at 398, 71 S.Ct. 745 (1951). See Grether, PRICE CONTROL UNDER FAIR TRADE LEGISLATION (1939).

⁴⁹⁵ *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 57 S.Ct. 139 (1936).

such "non-signer" provisions as to transactions in interstate and foreign commerce.⁴⁹⁶

A Michigan statute enacted in 1899 makes illegal and unenforcible contracts fixing resale prices in terms so broad as to make it questionable whether even an agreement between partners as to the prices at which their firm will sell is not illegal.⁴⁹⁷ This statute, like the Sher-

⁴⁹⁶ *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.*, 205 F. (2d) 788 (5th Cir. 1953), certiorari denied, 74 Sup. Ct. 71 (1953). The amendment was made by the McGuire Act of July 14, 1952, 66 Stat. 632, 15 U.S.C. 45, which was designed to overcome the decision in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745 (1951) that the Miller-Tydings Amendment did not permit their enforcement in interstate and foreign transactions.

⁴⁹⁷ "Sec. 1. That a trust is a combination of capital, skill or arts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce;

"2. To limit or reduce the production, or increase or reduce the price of, merchandise or any commodity;

"3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity;

"4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State;

"5. It shall hereafter be unlawful for two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, to make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void. . . .

"Sec. 8. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either

man Anti-Trust Act ⁴⁹⁸ and the statute of Edward VI, ⁴⁹⁹ if literally interpreted, would forbid virtually all trade. Like them it is an example of a type of legislation which is an invitation to tyranny, branding legitimate businessmen as criminals and subjecting them to the caprice of prosecuting officials. There are mischievous types of monopoly which ought to be criminal. It is unfortunate that our legislatures have been unwilling to undertake the difficult task of defining them with precision so that traders who wish to abide by the law might be able to determine what activities are permitted and what are not.

Hunt v. Riverside Co-operative Club ⁵⁰⁰ was a proceeding to restrain violation of the act of 1899. The defendant was an association comprising all seven of the plumbing supply dealers and 131 of 168 master plumbers in the City of Detroit. Its rules provided that the wholesalers would sell only to master plumbers at prices fixed by a committee of the association, the prices to master plumbers who were not members to be 15% to 30% higher than those charged members. An injunction against enforcement of these rules was granted, the court saying that such a price-fixing arrangement, designed to create a monopoly, was illegal at common law. Unquestionably the arrangement violated the act of 1899, so there can be no proper criticism of the result reached.

in law or equity."—Act 255, P.A. 1899, Comp. Laws (1915) §§15013, 15020; Comp. Laws (1929) §§16647, 16654; Mich. Stat. Ann. §§28.31, 28.36; Comp. Laws (1948) §§445.701, 445.708. Sec. 1 was amended by Act 60, P.A. 1925, to exempt farm and dairy cooperatives. Act 229, P.A. 1905, Comp. Laws (1915) §§15027 to 15032; Comp. Laws (1929) §§16661 to 16666; Mich. Stat. Ann. §§28.51 to 28.55; Comp. Laws (1948) §§445.761 to 445.767 supplemented the Act of 1899 by prohibiting contracts requiring dealers to handle only one make of machinery, tools, implements, vehicles, or appliances designed for use in productive industry.

⁴⁹⁸ Note 486 *supra*.

⁴⁹⁹ Stat. 5 & 6 Edw. VI, c. 14, §3 (1552); notes 466, 470, 472 *supra*.

⁵⁰⁰ 140 Mich. 538, 104 N.W. 40 (1905).

If by "common law" is meant the English law of 1607, however, it will be recalled that such price-fixing by local guilds was looked upon as the normal and proper method of determining just prices.

*W. H. Hill Co. v. Gray & Worcester*⁵⁰¹ was a suit by a drug manufacturer against a retailer to restrain price-cutting. The plaintiff manufactured Hill's Cascara Bromide Quinine and marketed it through wholesalers who contracted not to resell to retailers disapproved by the plaintiff. In order to secure approval, retailers were required to contract with the plaintiff not to sell at less than the price marked on each package of the drug. The defendant entered into such a contract in March, 1906, and complied with it until December, 1907, when it was rescinded by mutual consent. Soon after, the defendant secured a supply of Hill's Cascara Bromide Quinine from a wholesaler, who did not know of the rescission of the contract, and began retailing the product at a cut price. A decree dismissing the bill of complaint was affirmed. The court held that the plaintiff's system of retail price maintenance was illegal, both under the statute and at common law, relying entirely upon the federal decisions in *John D. Park & Sons Co. v. Hartman*⁵⁰² and *Dr. Miles Medical Co. v. Park & Sons Co.*⁵⁰³ and quoting the following from Judge Lurton's opinion in the *Hartman* case:

" 'A prime objection to the enforceability to [sic] such a system of restraint upon sales and prices is that they offend against the ordinary and usual freedom of traffic in chattels or articles which pass by mere delivery. The right of alienation is one of the essential incidents of a right of general property in moveables, and restraints

⁵⁰¹ 163 Mich. 12, 127 N.W. 803 (1910).

⁵⁰² (6th Cir. 1907) 153 F. 24, note 490 *supra*.

⁵⁰³ (6th Cir. 1908) 164 F. 803, *affd.* 220 U.S. 373, 31 S.Ct. 376 (1911), note 490 *supra*.

upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave, or an heirloom, have been generally held void. "If a man," says Lord Coke, in *Coke on Littleton*, s. 360, "be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man." It is also a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel, so as to follow the article and obligate the subpurchaser by operation of notice.' " 504

The quotation from Sir Edward Coke suggests that the rule laid down by these cases proscribes even a single contract restricting resale of a single chattel under circumstances which involve neither monopoly nor any effect on general market conditions. The fact that Coke is disqualified as an authority in this field by the vastly different economic and legal setting in which he wrote has already been suggested. Despite this reliance upon a line of reasoning which would apply to a single contract as well as to an extensive system designed to establish a monopoly, the opinions in both the *Hartman* and *Gray and Worcester* cases expressly state that a single contract is not governed by the same rule of illegality.⁵⁰⁵

⁵⁰⁴ 163 Mich. 12 at 23-24, 127 N.W. 803, quoting from 153 F. 24 at 39.

⁵⁰⁵ 153 F. 24 at 37; 163 Mich. 12 at 21, 127 N.W. 803. "A single contract, although it be such as, taken alone, may not be within the rule at common law against contracts in restraint of trade, which is one of a great number of identical contracts made between the producer of an unpatented article of commerce and dealers therein, forming a

In their attempt to state the common law in a situation governed by statute, these opinions add confusion to the common law. It seems unfortunate that the court was not content to rest its decision in *W. H. Hill Co. v. Gray & Worcester* on the Michigan statute of 1899.⁵⁰⁶

*Mulliken v. Naph-Sol Refining Co.*⁵⁰⁷ was an action for damages for breach of contract. The plaintiff, a wholesaler and retailer of gasoline, sent a letter to the defendant, agreeing to buy his gasoline requirements for a year from defendant at one and three quarters cents per gallon below the retail price set by the defendant for the Grand Rapids area. It contained no agreement by the plaintiff to abide by the retail prices so set. The parties dealt on this basis for nine months. There was dispute as to whether the plaintiff or the defendant refused to deal. The circuit judge directed a verdict for the defendant on the ground that, although the plaintiff had promised to buy gasoline, the defendant had not contracted to sell it. A judgment for the defendant was affirmed on the sole ground that the contract was illegal

'system' of contracts, which, taken as a whole, materially affects the public interests by stifling competition and trade in said article, is an unreasonable restraint, and within the rule at common law against contracts in restraint of trade, if, from an examination of the workings of the whole system, it appears that the restraint is actually, though not ostensibly, the main result and object of the system of contracts, and not merely ancillary or incidental to another and legitimate object." *Ibid.* One could wish that the common law prohibited such sentences as that quoted.

⁵⁰⁶ The opinion concludes with this passage: "But we place our decision upon the ground that complainant's system of contracts deals with the manufactured product of its secret process, and not with the process itself, and that the system of contracts, being a restraint upon free competition, falls within the common-law prohibition of restraints of trade, and is void.

"Having reached this conclusion, it is unnecessary to decide whether or not such contracts are illegal and void under the statute of this State." 163 Mich. 12 at 26, 127 N.W. 803.

⁵⁰⁷ 302 Mich. 410, 4 N.W. (2d) 707 (1942). The facts are not made clear in the opinion but are brought out in the record.

because it provided for the setting of retail prices by the defendant, the court citing *Hunt v. Riverside Co-operative Club*⁵⁰⁸ and the Act of 1899.⁵⁰⁹ The opinion contains the following language:

"In a reply brief appellant contends that the opening statement did not disclose a void contract and that the agreement 'was a good deal like a lease arrangement.' A lease is a contract and would be void under the statute quoted if it was for a purpose prohibited by law. So far as we are able to determine from this record, the arrangement between the parties was more nearly that of principal and agent, and an agency for an illegal purpose is void, just as is a contract for an illegal purpose."⁵¹⁰

This language would seem to condemn as illegal a retail merchant's prescribing the prices at which his sales clerks are to sell his goods. Such a construction of the Act of 1899 is certainly possible, but one may question whether the legislature really meant to restrain ordinary trade practices to such an extent.

*Staebler-Kempff Oil Co. v. Mac's Auto Mart, Inc.*⁵¹¹ was a suit to restrain the sale of gasoline at prices below those fixed by the plaintiff. In 1946 the plaintiff conveyed land in Ann Arbor to Martin Sales & Service Co. in fee simple by a deed containing a covenant by the grantee that if it built a filling station on the land it would purchase all its requirements of gasoline, oil, and lubricants from the plaintiff and would retail such products at the prices customarily furnished to other dealers in the area. The covenant provided that it should run with the land and be operative for ten years. In 1947

⁵⁰⁸ Note 500 *supra*.

⁵⁰⁹ Note 497 *supra*.

⁵¹⁰ 302 Mich. 410 at 413-414, 4 N.W. (2d) 707.

⁵¹¹ 329 Mich. 351, 45 N.W. (2d) 316 (1951). *Cf. Knoop v. Penn Eaton Motor Oil Co.*, 331 Mich. 693, 50 N.W. (2d) 329 (1951).

Martin Sales & Service Co. conveyed the land to the defendant by a deed containing the same covenant. The plaintiff sold 1,600 gallons of gasoline to the defendant and then requested the defendant to enter into a resale price maintenance contract of the type the plaintiff required of its retail dealers. The defendant declined. A decree restraining the defendant from selling at prices below those which the plaintiff prescribed for retailers bound by contract to it was affirmed. Without referring to the well-settled rule that use restrictions on land must be appurtenant to neighboring land,⁵¹² the court held that the covenant imposed a reasonable and valid use restriction which ran with the land and bound the defendant. As to the Act of 1899, the court said:

"The statute, if read literally, would seem to support the defendant's contentions. However, the statute does not define restraint of trade, and the definition has been judicially supplied. It has long been held that a contract would not be construed as in restraint of trade unless the restraint was unreasonable. . . .

"The cases cited by the appellant are not in point. *Hunt v. Riverside Co-Operative Club*, *supra*,⁵¹³ and *Muliken v. Naph-Sol Refining Co.*, *supra*,⁵¹⁴ involved agreements which were patently injurious to the interests of the public. *W. H. Hill Co. v. Gray & Worcester*, *supra*,⁵¹⁵ was decided prior to our Court's interpretation of the act of 1899 in *People, ex rel. Attorney General v. Detroit*

⁵¹² Note 482 *supra*; *Baxter v. Ogooshevitz*, 205 Mich. 249, 171 N.W. 385 (1919). A condition subsequent against sale of liquor in a conveyance of land in fee, inserted for the purpose of keeping employees of the grantor's saw mill sober, was enforced in an action of ejectment in *Smith v. Barrie*, 56 Mich. 314, 22 N.W. 816 (1885). A similar condition, inserted for the purpose of protecting the grantor's saloon against competition, was enforced by injunction in *Watrous v. Allen*, 57 Mich. 362, 24 N.W. 104 (1885).

⁵¹³ Note 500 *supra*.

⁵¹⁴ Note 507 *supra*.

⁵¹⁵ Note 501 *supra*.

Asphalt Paving Co., supra,⁵¹⁶ and does not represent the current judicial interpretation of the statute, nor do the facts present as fair and compelling a business purpose as is present in the instant case.

"In view of our decision there is no need to discuss the effect of the Michigan fair trade act, . . . on this covenant."⁵¹⁷

The Michigan Fair Trade Law of 1937⁵¹⁸ provides that contracts relating to the sale or resale of a commodity bearing the trade-mark, brand, or name of the producer or owner and which is in fair and open competition with similar commodities produced by others shall not be deemed in violation of state law because they provide that the buyer will not resell at less than the price fixed by the seller or that the buyer will not resell except to persons who agree to maintain resale prices. The act contains a "non-signer" provision, as follows:

"Sec. 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so

⁵¹⁶ 244 Mich. 119, 221 N.W. 122 (1928). This was a quo warranto proceeding under the Act of 1899 against a corporation organized by the four principal paving contractors in Detroit to effect a partial consolidation of their businesses.

⁵¹⁷ 329 Mich. 351 at 356, 358, 45 N.W. (2d) 316 (1951).

⁵¹⁸ Act 50, P.A. 1937, Mich. Stat. Ann. §§19.321 to 19.324; Comp. Laws (1948) §§445.151 to 445.154. Act 135, P.A. 1913, Comp. Laws (1915) §§15041 to 15048; Comp. Laws (1929) §§16683 to 16690; Mich. Stat. Ann. §§28.71 to 28.77; Comp. Laws (1948) §§445.791 to 445.798, prohibits petroleum distributors from making geographical price discriminations for the purpose of destroying the business of a competitor. This, of course, was an earlier legislative recognition of the fact that unregulated competition is not always of public benefit. Such contracts intended to *injure* or destroy a competitor were prohibited in the petroleum and bakery trades by Act 282, P.A. 1937, Mich. Stat. Ann. §§28.78 (1) to 28.78 (14); Comp. Laws (1948) §§445.171 to 445.184. The latter act also prohibits sale of petroleum and bakery products below cost with intent to injure or destroy a competitor.

advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby, and may be enjoined by a court of competent jurisdiction."

Notwithstanding the earlier decision of the Supreme Court of the United States that such a "non-signer" provision did not violate the Federal Constitution,⁵¹⁹ the Michigan Supreme Court held in *Shakespeare Company v. Lippman's Tool Shop Sporting Goods Company*⁵²⁰ that Section 2 was void under the State Constitution as to a "non-signer."

Except as to transactions governed by the Fair Trade Act, the law of restraints on resale of chattels is in an unhappily confused state. The old common law developed in a period when competition was looked upon as evil, and close public regulation of prices and commercial transactions was the normal rule. The nineteenth century revolution in thought and public policy, which exalted free competition and unregulated trade as an important object of society, made it difficult for the courts to make wise use of the precedents laid down in the old era. The anti-trust legislation of the turn of the century, which tended to class all restraints on competition, regardless of size or importance, with pernicious monopolies, added to the confusion. The recent realization, partly recognized by statute, that completely unregulated

⁵¹⁹ *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 57 S.Ct. 139 (1936), note 495 *supra*.

⁵²⁰ 334 Mich. 109, 54 N.W. (2d) 268 (1952). In *Weco Products Co. v. Sam's Cut Rate, Inc.*, 296 Mich. 190, 295 N.W. 611 (1941) an injunction against a "non-signer" was dissolved on the grounds that its price-cutting was not wilful and knowing and that the plaintiff had been guilty of inequitable behavior. An injunction against a "non-signer" was denied in *Miles Laboratories, Inc. v. Simon*, (D.C. Mich. 1940) 33 F. Supp. 962 on the ground that the defendant's practice of selling at the price set by the producer, without adding the state sales tax, was not a violation of the act.

competition is not always publicly desirable has complicated the situation still further. In the present state of the authorities it would be unwise to attempt to predict the validity of restraints on resale of chattels imposed in a commercial transaction where no elements of pernicious monopoly are present. May, for example, an artist who sells a painting to a museum at a low price in consideration of the vendee's contracting not to resell to a private collector for ten years, enforce the contract? His object, keeping the painting on public display, could be accomplished by means of the trust device. Whether the law of restraints on alienation of legal interests prevents its being accomplished by the device of contract, we do not know.

Shares in business enterprises, including partnerships, joint-stock companies, and corporations, have come to be treated as property for some purposes. The same may be said as to certain types of contract rights, notably such evidences of debt as bonds, debentures, and notes, insurance policies, and annuity contracts. Indeed, much of the wealth of the modern community is invested in property of these types. Shares in partnerships involve not only property interests but mutual agency, mutual trust and confidence in business skill, and liability for debts. Hence their alienability may be and usually is, much restricted.⁵²¹ Shares in joint-stock companies and corporations involve powers of management and rights of association; corporations often perform quasi-governmental functions. Both the shareholder and the public have an interest in ensuring competency and continuity of management, which is sometimes protected by re-

⁵²¹ Lindley, *LAW OF PARTNERSHIP* *186-187; *593-594 (ed. 1860); Uniform Partnership Act, Act 72, P.A. 1917, §§24 to 28; Comp. Laws (1929) §§9864 to 9868; Mich. Stat. Ann. §§20.24 to 20.28; Comp. Laws (1948) §§449.24 to 449.28.

straints on alienation of shares.⁵²² Their free alienability has been further restricted by statute to protect the public against the promotion of fraudulent schemes and unsound enterprises.⁵²³ The rules as to transferability of bonds and notes have evolved as parts of the law of contracts and negotiable instruments. Insurance policies and annuity contracts involve elements which are peculiarly personal, relating to the character, health, and habits of the holders.⁵²⁴ In consequence of their peculiarities, special rules of law, much of it statutory, governing the transferability of shares in business enterprises and the mentioned types of intangible property, have developed.

⁵²² Annotation: Validity of restrictions by corporations on alienation or transfer of corporate stock, 65 A.L.R. 1159-1186 (1930); 138 A.L.R. 647-657 (1942). Our statutes expressly permit restraints on the alienation of stock in nonprofit corporations, co-operative corporations and partnership associations limited. Act 327, P.A. 1931, §§102, 119; Mich. Stat. Ann. §§21.103, 21.120; Comp. Laws (1948) §§450.102, 450.119; Act. 191, P.A. 1877, §4, as amended, How. Stat. §2368; Comp. Laws (1897) §6082; Comp. Laws (1915) §7953; Comp. Laws (1929) §9912; Mich. Stat. Ann. §20.94; Comp. Laws (1948) §449.304. The Uniform Stock Transfer Act, Act 106, P.A. 1913, §15, Comp. Laws (1915) §11934, Comp. Laws (1929) §9534, Mich. Stat. Ann. §19.345; Comp. Laws (1948) §441.15, appears to recognize such restraints as to stock of profit corporations, but see *Lufkin Rule Co. v. Secretary of State*, 163 Mich. 30, 127 N.W. 784 (1910). Compare *Bronson Electric Co. v. Rheubottom*, 122 Mich. 608, 81 N.W. 563 (1900); *Weiland v. Hogan*, 177 Mich. 626, 143 N.W. 599 (1913); *Halsey v. Boomer*, 236 Mich. 328, 210 N.W. 209 (1926); *Bohnsack v. Detroit Trust Co.*, 292 Mich. 167, 290 N.W. 367 (1940); *Weber v. Lane*, 315 Mich. 678, 24 N.W. (2d) 418 (1946). In *Barnes Co., Inc. v. Folsinski*, 337 Mich. 370, 60 N.W. (2d) 302 (1953), an agreement between a corporation and one of its officers to whom it sold stock that the stock should be inalienable except to the corporation and should be repurchased by the corporation when, by reason of death or otherwise, he ceased to be employed by it, was enforced. Cf. Part Two, note 385 *infra*.

⁵²³ Bubble Act, 6 Geo. I, c. 18, §§18-21 (1720); Formoy, *HISTORICAL FOUNDATIONS OF MODERN COMPANY LAW* 47-88 (1923); Dubois, *THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT 1720-1800*, 1-12 (1938); Lindley, *LAW OF PARTNERSHIP* *145-154 (ed. 1860); Blue Sky Law, Act 220, P.A. 1923, as amended, Comp. Laws (1929) §§9769 to 9801; Mich. Stat. Ann §§19.741 to 19.773; Comp. Laws (1948) §§451.101 to 451.133.

⁵²⁴ Grismore, "Effect of a Restriction on Assignment in a Contract," 31 MICH. L. REV. 299-319 (1933).

These rules sometimes permit, incident to the creation of the interests or to commercial transactions involving them, restraints on alienation of types which would be invalid if applied to ordinary legal interests in land or chattels. Discussion of the validity of restraints on alienation of these special types of "property" which arise from or are related to their peculiar character is beyond the scope of this study.

CHAPTER 8

Equitable Interests and Interests Subject Thereto

A. THE ORIGIN OF EQUITABLE ESTATES

IN THE Middle Ages a conveyance of land to a monastic corporation resulted in a serious loss of income to the feudal overlord. As such corporations never died, the overlord ceased to receive the reliefs payable on the death of a tenant and to enjoy the feudal incidents of wardship and marriage of minor heirs. Monks could not be compelled to perform military services, and it was difficult or impossible to compel a monastery to perform other services incident to tenure. The twelfth and thirteenth centuries saw great expansion in monastic land holdings and consequent loss to the king and other overlords in income and military strength. A statute was enacted in 1279 to put an end to conveyances to monastic corporations without the consent of the injured overlords. It provided that, when such a conveyance was made, the overlord might enter within the year and forfeit the tenant's estate.⁵²⁵

The great Benedictine and Cistercian orders, which specialized in agriculture, already owned many estates and probably were not greatly hurt by the new statute.⁵²⁶

⁵²⁵ Statute of Mortmain, 7 Edw. I, stat. 2 (1279).

⁵²⁶ The Cistercians, for example, reached England in 1127, built a hundred monasteries in the century which followed, and added only one between 1227 and the dissolution of the monasteries under Henry VIII. Butler, "Cistercians," *ENCYCLOPAEDIA BRITANNICA*, 11th ed. (1910). It would seem from this that the order had reached its full development some fifty years before the Statute of Mortmain.

Their corporate wealth enabled them to pay for licenses from the overlords to purchase land. The newer Dominican and Franciscan orders of friars, who preached and ministered unto the poor, the sick, and the aged in towns, much like the modern Salvation Army, were, however, hampered in their efforts to acquire sites for hospitals and homes for the poor and aged. To avoid the statute they resorted to the device of having land conveyed to the municipal corporation, which agreed informally to allow them to use it.⁵²⁷ That this palpable evasion of the statute of 1279 was tolerated for over a century was probably due to the facts that the friars usually acquired only relatively small parcels in towns, rather than large tracts of agricultural land, and that their activities were of recognized public benefit. The friars' device was deprived of its efficacy by a statute of 1391, which attacked it from two directions by providing that conveyances to municipal corporations should be within the statute of 1279 and that conveyances to anyone to the use of religious persons should also be within that statute.⁵²⁸

Long before 1391, the advantage of the use device to lay landowners was seen, and it was adopted by their conveyancers. An elderly landowner whose heir was a minor daughter could avoid the onerous feudal burdens of relief, wardship, and marriage which would otherwise arise upon his death by conveying to several young friends as joint tenants to hold to the use of himself and his heirs. The feudal dues incident to death would not then arise until the death of the last joint tenant and even this could be avoided by adding new tenants as the original ones

⁵²⁷ Maitland, *Equity*, 2d ed., 24-25 (1936). The use device seems to have been known before the statute. See *Quency v. Prior of Barnwell*, Bract., N.B., pl. 999 (1224).

⁵²⁸ Stat. 15 Ric. II, c. 5, §§5, 7 (1391). See 23 Hen. VIII, c. 10 (1531).

died. The rule prohibiting devise of freehold estates ⁵²⁹ could be avoided by a conveyance to the use of the conveyor for life and thereafter to such uses as he might by will appoint. ⁵³⁰ The Wars of the Roses, with their frequent changes of dynasty and numerous prosecutions for treason, gave every politically active landowner a strong motive for placing the title to his land in the names of persons who were unlikely to be attainted of treason, since attainder involved forfeiture of all lands to the Crown. ⁵³¹ Conveyances to the use of laymen were not interfered with by legislation for some two centuries, except to the extent that they were used to defraud creditors or to defeat a reversioner's action for waste. ⁵³² It would seem that most of the land in England was conveyed to uses during this period. ⁵³³

The common-law courts would not enforce the rights of the *cestui que use* or beneficiary against the feoffee to uses, who held the legal title. ⁵³⁴ From the end of the fourteenth century, however, the lord high chancellors, who were nearly always bishops, did so. ⁵³⁵ After some hesitation, the chancellors undertook to enforce the use

⁵²⁹ 2 Pollock & Maitland, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 312-328 (1895); note 8 *supra*.

⁵³⁰ Bacon thought that this was the chief reason for the rise of the use device. READING UPON THE STATUTES OF USES 20-21 (ed. 1804). See Maitland, EQUITY, 2d ed., 25-26 (1936); Jenks, SHORT HISTORY OF ENGLISH LAW, new ed., 104 (1934); Sullivan, HISTORICAL TREATISE ON THE FEUDAL LAW 166-167 (1772); Stat. 4 Hen. VII, c. 4 (1487); 7 Hen. VII, c. 3 (1490); 3 Hen. VIII, c. 4 (1511).

⁵³¹ Sanders, USES AND TRUSTS, 5th ed., 16-17 (1844).

⁵³² Stat. 50 Edw. III, c. 6, §2 (1376); 1 Ric. II, c. 9 (1377); 4 Hen. IV, c. 7 (1402); 11 Hen. VI, cc. 3, 5 (1433).

⁵³³ 1 Coke, INSTITUTES *272a; Sanders, USES AND TRUSTS, 5th ed., 17 (1844).

⁵³⁴ Anonymous, Y.B. 4 Edw. IV, Pasch., pl. 9 (1464).

⁵³⁵ Godwyn v. Profyt, Sel. Cases in Chancery (S.S.) 48 (1396-1399); Ames, "Origin of Uses and Trusts," 21 HARV. L. REV. 261 at 262, 274 (1908); Brown, "Ecclesiastical Origin of the Use," 10 NOTRE DAME LAWYER 353 at 361-366 (1935).

against the heir of the feoffee to uses⁵³⁶ and against persons to whom the feoffee conveyed the legal title, if they had notice of the use or had not paid a valuable consideration.⁵³⁷ As the *cestui que use* was nearly always in actual possession of the land, it followed as a practical matter that the feoffee to uses could not convey the legal title free of the use.

The use device was intended to give the *cestui que use* all the advantages of full ownership of the land, less some of the burdens of ownership, and with the additional power of devising his interest. In its enforcement of uses, the High Court of Chancery brought this intention to full realization. It enforced estates in uses, in fee simple, in fee tail, for life and for years, which corresponded to the legal estates in land.⁵³⁸ Estates in expectancy by way of reversion, remainder, and springing and shifting use were possible. The estate of the *cestui que use* was devisable by will⁵³⁹ and alienable inter vivos.⁵⁴⁰ By a statute of 1483 he was empowered to convey the legal title without the consent of its holder.⁵⁴¹ Thus the *cestui que use* had greater powers of alienation than a legal owner.

Then, in 1535, the Statute of Uses converted the equitable estate of the *cestui que use* into a legal estate of like

⁵³⁶ Anonymous, Keilway 42, 72 Eng. Rep. 200 (1502).

⁵³⁷ Anonymous, Y.B. 11 Edw. IV, Trin., pl. 13 (1471); Anonymous, Y.B. 14 Hen. VIII, Mich., pl. 5 (1523); Abbot of Bury v. Bokenham, 1 Dyer 7b, 73 Eng. Rep. 19 (1536). The arguments in this case are an elaborate discussion of the effect of a conveyance by the feoffee to uses.

⁵³⁸ Turner, THE EQUITY OF REDEMPTION 7-8 (1931).

⁵³⁹ Rothanhale v. Wyehingham, 2 Cal. Proc. Ch. iii (1413-1422); Williamson v. Cook, Sel. Cas. in Chan. (S.S.), pl. 118 (1417-1424); note 530 *supra*.

⁵⁴⁰ Bacon, READING UPON THE STATUTES OF USES 16 (1642); Cruise, ESSAY ON USES §36 (1795); Gilbert, LAW OF USES AND TRUSTS, 2d ed., 26 (1741); Holmes, COMMON LAW 408 (1881); Sanders, ESSAY ON USES AND TRUSTS, 4th ed., 65 (1823).

⁵⁴¹ Stat. 1 Ric. III, c. 1 (1483).

quantity.⁵⁴² This put an end to uses as such. Nevertheless, in the two centuries which followed, the High Court of Chancery developed three types of equitable estates which resembled the old use in many respects and had most of its characteristics, the trust, the equity of redemption, and the vendee's interest under an executory land contract. These three have much in common, but the latter two differ from the former in that the legal title of the mortgagee and the vendor is, in part, beneficial to him, whereas that of the trustee is not. Hence separate treatment is desirable.

B. TRUSTS IN THE ABSENCE OF STATUTE

The Statute of Uses in terms deprived the High Court of Chancery of all jurisdiction over uses created on freehold estates in land. It had no application to estates for years and uses in chattels.⁵⁴³ Soon after the enactment of the statute, it was held that it did not apply, even though the feoffee to uses had an estate of freehold, if the conveyance imposed active duties upon him.⁵⁴⁴ A century after the statute, the High Court of Chancery began to enforce as an equitable estate, the use on a use.⁵⁴⁵ In these four situations, namely, those of estates for years, chattels personal, active trusts, and the use on a use, re-

⁵⁴² Stat. 27 Hen. VIII, c. 10 (1535).

⁵⁴³ It should be noted that it is the freehold or non-freehold character of the legal estate of the feoffee to uses or trustee which governs the applicability of the statute, not the character of the estate of the *cestui que use* or *cestui que trust*. See Bacon, *READING UPON THE STATUTE OF USES* 42 (1642); Sanders, *USES AND TRUSTS*, 4th ed., 87 (1823).

⁵⁴⁴ Anonymous, *Brook's New Cases* 94, 73 Eng. Rep. 888 (1545); *Nevil v. Saunders*, 1 Vern. 415, 23 Eng. Rep. 555 (1686).

⁵⁴⁵ *Tyrrel's Case*, 2 Dyer 155a, 73 Eng. Rep. 336 (1557) (common-law decision that use on a use is not within the statute); *Sambach v. Dalston*, Tothill 188, 21 Eng. Rep. 164 (1634) (chancery decision that use on a use is enforceable in Chancery); Ames, "Origin of Uses and Trusts," 21 HARV. L. REV. 261 at 270-274 (1908).

lationships much like that of the old use were treated in Chancery as trusts. The holder of the legal title was a trustee and the equitable beneficiary a *cestui que trust*. The High Court of Chancery developed and enforced the rights of the *cestui que trust* by analogy to those of the old *cestui que use*. In the law of trusts the development of equitable estates and interests corresponding to legal estates and interests has been more full and elaborate than that of estates in uses. As Lord Mansfield said in a Chancery case,

“The *forum* where they are adjudged is the only difference between trusts and legal estates. Trusts are here considered as between *cestuy que trust* and trustee (and all claiming by, through, or under them, or in consequence of their estates), as the ownership or legal estate, except when it can be pleaded in bar of the exercise of this right of jurisdiction. Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate. . . . the trust is the estate at law in this court, and governed by the same rules in general, as all real property is, by limitation. . . . *cestuy que trust* is actually and absolutely seised of the freehold in consideration of this court; and therefore . . . the legal consequences of an actual seisin of a freehold, shall, in this court, follow . . .”⁵⁴⁶

The rules as to alienation by a trustee were the same as those which applied to conveyances by a feoffee to uses.⁵⁴⁷ If the trustee conveyed the trust property to a purchaser who had notice of the trust or who had not paid value, the purchaser took subject to the trust.⁵⁴⁸ Moreover, unless, under the terms of the trust, the

⁵⁴⁶ *Burgess v. Wheate*, 1 Eden 177, 223-226, 28 Eng. Rep. 652, 670-671 (1759).

⁵⁴⁷ Note 537 *supra*.

⁵⁴⁸ *Bovey v. Smith*, 1 Vern. 144, 23 Eng. Rep. 377 (1682, 1692); *Saunders v. Dehew*, 2 Vern. 271, 23 Eng. Rep. 775 (1692); *Pye v. Gorge*, 1 P. Wms. 128, 24 Eng. Rep. 323 (1710).

trustee had power to make such a sale or power to appoint his own successor, the alienee would be compelled to reconvey or to convey to a new trustee appointed by the High Court of Chancery.⁵⁴⁹ The heir, devisee, and levying creditor of the trustee likewise took subject to the trust.⁵⁵⁰ A bona fide purchaser for value of the legal estate of the trustee took free of the trust,⁵⁵¹ but the trustee who conveyed to a bona fide purchaser for value in breach of trust would be compelled to make restitution to the trust estate by repurchasing the property or purchasing property of like type and value.⁵⁵² Thus the trust became a very effective means of restraining alienation of the legal title to interests in land or chattels. The trustee, however, does not hold his title beneficially. It is beneficial ownership, the actual right to use and enjoy land and goods, which is the primary concern of the law of restraints on alienation.

The *cestui que use* was usually in possession of the land; the *cestui que trust* normally is not in possession of the trust property. The rights of the *cestui que use* were established by custom as a property interest before the High Court of Chancery began to enforce them; the rights of the *cestui que trust* were a creation of that court and so appeared more like a chose in action than a prop-

⁵⁴⁹ Anonymous, 3 Swanst. 79a, 36 Eng. Rep. 781 (c. 1800); note 548 *supra*.

⁵⁵⁰ Heir, devisee, or legatee; Mortimer v. Ireland, 6 Hare 196, 67 Eng. Rep. 1138 (1847); note 536 *supra*. The dower of the trustee's widow was also subject to the trust, which meant, practically, that she had no dower. Noel v. Jevon, 2 Freeman 43, 22 Eng. Rep. 1047 (1678); Hinton v. Hinton, 2 Ves. Sr. 631 at 634, 28 Eng. Rep. 402 at 404 (1755). Creditor levying without notice of the trust: Newlands v. Newlands, 4 My. & Cr. 408, 41 Eng. Rep. 158 (1840); Whitworth v. Gaugain, 3 Hare 416, 67 Eng. Rep. 444 (1844).

⁵⁵¹ See Bassett v. Nosworthy, Rep. temp. Finch 102, 23 Eng. Rep. 55 (1673); note 537 *supra*.

⁵⁵² Mansell v. Mansell, 2 P. Wms. 678, 24 Eng. Rep. 913 (1732); see Tipping v. Piggot, 1 Eq. Cas. Abr. 385, 21 Eng. Rep. 1120 (1711).

erty interest. Choses in action were generally inalienable.⁵⁵³ In consequence of these differences between the estate of the *cestui que use* and the interest of the *cestui que trust*, the early decisions treated the interest of the beneficiary of a trust as a chose in action which could be transmitted by will but was not transferable inter vivos.⁵⁵⁴ By the seventeenth century, however, the property analogy prevailed, and a *cestui que trust* could transfer his interest inter vivos as freely as he could an equivalent legal estate.⁵⁵⁵

It having been determined that equitable estates and interests correspond to legal estates and interests of the same duration and that, like legal estates and interests, they have an incident of alienability, it would seem to follow that the rules which govern restraints on alienation of legal estates and interests apply as well to equitable estates and interests of the same types. Such, with an exception which is more apparent than real, was the English law. It will be recalled that restraints on alienation assume two forms, the prohibition, which, if valid, would make a conveyance by the owner or a levy by his creditors wholly ineffective, leaving the ownership in him, and the penalty restraint, designed to penalize alienation by forfeiture of the interest or otherwise. As has been seen, prohibitions on alienation of legal interests in property are always void, whether the property is land or chattels and whether the interest is perpetual, for life, or for a term. In England the same rule of null-

⁵⁵³ Ames, "The Inalienability of Choses in Action," LECTURES ON LEGAL HISTORY 210-218 (1913).

⁵⁵⁴ Anonymous, 3 Dyer 369a, 73 Eng. Rep. 827, Jenk. 245, 145 Eng. Rep. 172 (1580); Earl of Worcester v. Finch, 4 Coke, INSTITUTES 85, 2 Anderson 162, 123 Eng. Rep. 600 (1600); Holmes, COMMON LAW 409 (1881).

⁵⁵⁵ Warmstrey v. Lady Tanfield, 1 Ch. R. 29, 21 Eng. Rep. 498 (1628).

ity was applied to prohibitions on alienation of the interest of a *cestui que trust*.⁵⁵⁶ The rule had one exception in that an effective prohibition could be imposed on alienation by a married woman of her separate equitable estate.⁵⁵⁷ As Professor Gray has observed, this exception was not really in conflict with the rule as to legal interests, since a married woman could not hold legal title to chattels at common law and could not convey her legal title to land by ordinary means.⁵⁵⁸ As to penalty restraints, the English equity rules likewise follow the rules at law. A provision for forfeiture on any alienation of an equitable estate in fee simple or an equivalent interest in chattels is void.⁵⁵⁹ A provision for forfeiture on alienation of an equitable life estate is valid, whether the

⁵⁵⁶ *Brandon v. Robinson*, 18 Ves. Jr. 429, 34 Eng. Rep. 379 (1811); *Jones v. Salter*, 2 Russ. & M. 208, 39 Eng. Rep. 374 (1815); *Barton v. Briscoe*, Jac. 603, 37 Eng. Rep. 978 (1822); *Graves v. Dolphin*, 1 Sim. 66, 57 Eng. Rep. 503 (1826); *Woodmeston v. Walker*, 2 Russ. & M. 197, 39 Eng. Rep. 370 (1831); *Brown v. Pocock*, 2 Russ. & M. 210, 39 Eng. Rep. 374 (1833). Other cases are collected in Gray, *RESTRAINTS ON ALIENATION*, 2d ed., §§105-112, 134-168 (1895). If the *cestui's* interest is limited to a right to support or to such sums as the trustees in their discretion choose to pay him, the purchaser or creditor may not acquire much.

⁵⁵⁷ *Jackson v. Hobhouse*, 2 Mer. 483, 35 Eng. Rep. 1025 (1817); *Tullett v. Armstrong*, 4 My. & Cr. 377, 41 Eng. Rep. 147 (1840); *Baggett v. Meux*, 1 Ph. 627, 41 Eng. Rep. 771 (1846). The restraint was effective, however, only while the woman was married, ceasing upon her husband's death. *Jones v. Salter*; *Barton v. Briscoe*, note 556 *supra*. The Married Women (Restraint Upon Anticipation) Act, 1949, 12, 13 & 14 Geo. VI, c. 78, §1(1), provides, "No restriction upon anticipation or alienation attached, or purported to be attached, to the enjoyment of any property by a woman which could not have been attached to the enjoyment of that property by a man shall be of any effect after the passing of this Act." This statute replaced a similar enactment which applied only to restraints imposed after 1935. The Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. V, c. 30, §2.

⁵⁵⁸ Gray, *RESTRAINTS ON ALIENATION*, 2d ed., §§140-141, 269 (1895).

⁵⁵⁹ *Re Dugdale*, [1888] 38 Ch. Div. 176; *Corbett v. Corbett*, [1888] 13 P. Div. 136, 14 P. Div. 7; Gray, *RESTRAINTS ON ALIENATION*, 2d ed., §20 (1895). As in the case of legal estates in fee simple (as to which see note 128 *supra*), the rules as to restraints which are limited as to proscribed alienees are confused. Gray, *id.*, §§35-39.

alienation restrained be voluntary or involuntary, if the trust is created by someone other than the life *cestui*.⁵⁶⁰ If, however, the *cestui que trust* for life or years is the settlor of the trust, a provision for forfeiture of his estate on involuntary alienation is void.⁵⁶¹

Where it has not been affected by statute, American law follows, in general, the English view as to the effect of a trust in restraining alienation of the legal title to property. That is to say, a transfer by the trustee under power expressly or impliedly granted by the instrument creating the trust conveys the property to the transferee free of trust;⁵⁶² a transfer by the trustee which violates the provisions of the trust conveys the legal title but not necessarily free of the trust. If the transfer is to a purchaser who has notice of the trust,⁵⁶³ or to a donee,⁵⁶⁴ the transferee takes subject to the trust and may be compelled to reconvey to the trustee or to a successor trustee. If the transfer is to a bona fide purchaser for value, without notice of the trust, the transferee takes free of the trust,⁵⁶⁵ but the trustee may be compelled to make resti-

⁵⁶⁰ *Lockyer v. Savage*, 2 Strange 947, 93 Eng. Rep. 959 (1733). Numerous cases in accord are collected in Gray, *RESTRAINTS ON ALIENATION*, 2d ed., §78 (1895).

⁵⁶¹ *Higinbotham v. Holme*, 19 Ves. Jr. 88, 34 Eng. Rep. 451 (1812). Other cases are collected in Gray, *RESTRAINTS ON ALIENATION*, 2d ed., §§91, 93-95. The validity of a restraint on voluntary alienation of the life interest of a *cestui que trust* who is also the settlor of the trust is doubtful. *Id.*, §§96-100.

⁵⁶² *TRUSTS RESTATEMENT* §283 (1935); 2 *SCOTT, LAW OF TRUSTS* §283 (1939).

⁵⁶³ *TRUSTS RESTATEMENT* §288 (1935); 2 *SCOTT, LAW OF TRUSTS* §288 (1939). The cases are collected in 1 *Perry, LAW OF TRUSTS AND TRUSTEES*, 7th ed. §217n (1929).

⁵⁶⁴ *TRUSTS RESTATEMENT* §289 (1935); 2 *SCOTT, LAW OF TRUSTS* §289 (1939). The cases are collected in *Scott* and in *Perry*, note 563 *supra*.

⁵⁶⁵ *TRUSTS RESTATEMENT* §284 (1935); 2 *SCOTT, LAW OF TRUSTS* §284 (1939). The cases are collected in *Perry*, *supra* note 563, §§218-221nn. One who purchases in good faith and for value, without notice of the trust, from a transferee of the trustee who had notice or who did not pay value, also takes free of the trust. *TRUSTS RESTATEMENT* §287 (1935); 2 *SCOTT, LAW OF TRUSTS* §287 (1939).

tution to the trust estate.⁵⁶⁶

As to penalty restraints on alienation by the *cestui que trust* of his equitable interest, American law likewise tends to follow the English view. That is to say, provisions for forfeiture on alienation are generally void when annexed to an equitable estate in fee simple or an interest in personal property of equivalent duration,⁵⁶⁷ and they are generally valid when annexed to an equitable interest for life or years.⁵⁶⁸ As to restraints on alienation by way of prohibition, however, the American law has diverged widely from the English and from the rules governing restraints on legal interests. Where the only interest of a *cestui que trust* is to receive the income from the trust property for his life, part of his life, or a term of years, most American courts will enforce specifically a provision in the instrument creating the trust prohibiting the *cestui que trust* from transferring his interest and his creditors from reaching it.⁵⁶⁹ This "spendthrift trust" doctrine is an extension of the English enforcement of prohibitions on alienation of the equitable estates of married women, but it is not restricted to married women or incompetents. Moreover, the American decisions treat the interest of the *cestui que trust* under a trust for his support as inalienable even in the absence of an ex-

⁵⁶⁶ TRUSTS RESTATEMENT §§202, 205, 208 (1935); 2 SCOTT, LAW OF TRUSTS §§202, 205, 208 (1939). This is not so, generally, if the *cestui que trust* consented to the transfer at or before the time it was made, even though there are valid prohibitory restraints on alienation by the *cestui* of his own interest. TRUSTS RESTATEMENT §216; SCOTT, §216.

⁵⁶⁷ TRUSTS RESTATEMENT §150 (1935); 1 SCOTT, LAW OF TRUSTS §150 (1939); SCHNEBLY, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.92 (1952).

⁵⁶⁸ *Ibid.*

⁵⁶⁹ TRUSTS RESTATEMENT §152 (1935); 1 SCOTT, LAW OF TRUSTS §152 (1939); SCHNEBLY, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.94 (1952). The cases are collected and discussed in SCOTT, §§152.1 to 152.6 and GRISWOLD, SPENDTHRIFT TRUSTS, 2d ed., §§53-60 (1947).

press prohibition on alienation.⁵⁷⁰ As to equitable interests in fee simple, whether in present enjoyment or in expectancy, and interests in personal property of like duration, there is considerable confusion in the American cases.⁵⁷¹ The *Restatement of Trusts* takes the position that prohibitory restraints on alienation of such interests are invalid except that where, by the terms of the trust, the *cestui que trust* is entitled to have the income paid to him for life or a term of years, and thereafter to have the trust property conveyed to him or to those deriving title through him, a prohibition on voluntary or involuntary alienation of the right to income accruing during his life is valid.⁵⁷² Spendthrift trust prohibitions are generally treated as ineffective against claims for necessities supplied the *cestui que trust*, for services and supplies which preserve or benefit his interest in the trust, and for support or alimony of his wife and children.⁵⁷³ They are considered invalid as to a trust created by the *cestui que trust* himself.⁵⁷⁴

⁵⁷⁰ TRUSTS RESTATEMENT §154 (1935); 1 SCOTT, LAW OF TRUSTS §154 (1939); GRISWOLD, SPENDTHRIFT TRUSTS, 2d ed., §§430 to 434 (1947). This is not so where the amount to be paid or applied by the trustee is a specified sum or is not limited to what is necessary for the education and support of the *cestui que trust*, even though the primary purpose of the trust is support. TRUSTS RESTATEMENT, comment *d*; GRISWOLD, §433.

⁵⁷¹ 1 SCOTT, LAW OF TRUSTS §§153-153.3 (1939); GRISWOLD, SPENDTHRIFT TRUSTS, 2d ed., §§81-97, 102-106 (1947); SCHNEBLY, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.96 (1952).

⁵⁷² Sections 151, 153 (1935).

⁵⁷³ TRUSTS RESTATEMENT §157 (1935); 1 SCOTT, LAW OF TRUSTS §§157-157.3 (1939); GRISWOLD, SPENDTHRIFT TRUSTS, 2d ed., c. 6 (1947). Section 157 of the *Restatement of Trusts* was amended by the 1948 Supplement to add claims by the United States or a state or subdivision thereof, to the list of claims against which spendthrift provisions are ineffective.

⁵⁷⁴ TRUSTS RESTATEMENT §156 (1935); 1 SCOTT, LAW OF TRUSTS §§156-156.3 (1939); GRISWOLD, SPENDTHRIFT TRUSTS, 2d ed., c. 8, §282.1 (1947); SCHNEBLY, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.122 (1952).

C. MICHIGAN STATUTORY CHANGES IN THE LAW OF TRUSTS

During the years 1825 through 1828, a commission of three eminent lawyers prepared a revision of the statutes of the State of New York which, with some changes, was adopted by the legislature and published as the Revised Statutes of 1829, effective January 1, 1830.⁵⁷⁵ According to tradition, the plan of the revision was drafted by Judge Henry Wheaton, a lifelong admirer of France who had studied civil law at Poitiers and translated the *Code Napoléon* into English. The revisers' notes, which discuss the history of uses and trusts in England, reflect this influence. They admit that uses had utility in relieving the burdens of the feudal system and introducing flexibility in conveyancing, but they compare unfavorably the complexity of the English law caused by divided titles, legal and equitable, with the simple property provisions of the *Code Napoléon* and deplore the extent to which the High Court of Chancery nullified the Statute of Uses. The revisers thought that, if all feudal tenures and their incidents were abolished and a simple system of conveying legal title was provided, there would be no need for uses or trusts, except those for the benefit of creditors and for the protection of incompetents.⁵⁷⁶ They accordingly proposed a "modified abolition of uses and trusts," saying,

⁵⁷⁵ *Preface*, R.S.N.Y. 1829; 3 R.S.N.Y. 1829, 409 (ed. 1836); Butler, *THE REVISION OF THE STATUTES OF THE STATE OF NEW YORK AND THE REVISERS* (1889). The original commission consisted of John Duer, Benjamin F. Butler and Henry Wheaton. Judge Wheaton accepted a diplomatic appointment in 1827 and was replaced by John C. Spencer. Butler later served as Attorney General under Jackson. Wheaton was reporter of the United States Supreme Court, had a long career as a diplomat, and became an authority on international law. Duer later became a New York judge. Spencer was Secretary of War and of the Treasury under Tyler.

⁵⁷⁶ 3 R.S.N.Y., 579-587 (ed. 1836).

“As the creation of trusts is always in a greater or less degree the source of inconvenience and expense, by embarrassing the title, and requiring the frequent aid of a court of equity, it is desirable that express trusts should be limited as far as possible, and the purposes for which they may be created, strictly defined. The object of the Revisers in this section is to allow the creation of express trusts, in those cases and in those cases only where the purposes of the trust require that the legal estate should pass to the trustees. An assignment for the benefit of creditors, would in most cases be entirely defeated, if the title were to remain in the debtor, and where the trust is to receive the rents and profits of lands, and to apply them to the education of a minor, the separate use of a married woman, or the support of a lunatic or spendthrift, (the general objects of trusts of this description) the utility of vesting the title and possession in the trustees, is sufficiently apparent. After much reflection, the Revisers have not been able to satisfy themselves that there are any cases not enumerated in this section, in which, in order to secure the execution of the trust, it is necessary that the title or possession should vest in the trustees. . . .” ⁵⁷⁷

As enacted in 1828, the New York Revised Statutes provided,

“S. 45. Uses and trusts, except as authorized and modified in this Article, are abolished; and every estate and interest in lands, shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided in this Chapter.

“S. 47. Every person, who, by virtue of any grant, assignment or devise, now is, or hereafter shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest.

“S. 55. Express trusts may be created, for any or either of the following purposes:

1. To sell lands for the benefit of creditors:
2. To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon:
3. To receive the rents and profits of lands, and apply them to the *education and support, or either*,⁵⁷⁸ of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first Article of this Title:
4. To receive the rents and profits of lands, and to accumulate the same, for the purposes and within the limits prescribed in the first Article of this Title.⁵⁷⁹

“57. Where a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable, in equity, to the claims of the creditors of such person, in the same manner as other personal property, which cannot be reached by an execution at law.

“60. Every express trust, valid, as such, in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust. The persons for whose benefit the trust is created, shall take no estate or interest in the lands, but may enforce performance of the trust in equity.

“63. No person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable.

⁵⁷⁸ Emphasis supplied.

⁵⁷⁹ Part II, c. 1, tit. II, art. First, §37, limits accumulations to those for the benefit of minors during minority. Chapter 16, *infra*.

"64. Where an express trust is created, but is not contained or declared in the conveyance to the trustees, such conveyance shall be deemed absolute, as against the subsequent creditors of the trustees, not having notice of the trust, and as against purchasers from such trustees, without notice, and for a valuable consideration.

"65. Where the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees, in contravention of the trust shall be absolutely void.

"68. Upon the death of the surviving trustee of an express trust, the trust estate shall not descend to his heirs, nor pass to his personal representatives; but the trust, if then unexecuted, shall vest in the court of chancery, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose, under the direction of the court."⁵⁸⁰

In 1830, upon advice of the revisers, Subsection 3 of Section 55 was amended by striking out the words "education and support, or either," and substituting the word "use."⁵⁸¹

During the years 1844 through 1846, a revision of the statutes of Michigan was prepared by a single commissioner, Judge Sanford M. Green, a former New York lawyer.⁵⁸² Judge Green's draft contained a chapter on uses and trusts which incorporated, without change in

⁵⁸⁰ Part II, c. 1, tit. II, art. Second, §§45, 47, 55, 57, 60, 63, 64, 65, 68.

⁵⁸¹ 3 R.S.N.Y., 579 (ed. 1836). As to this, the revisers said, "The word 'use' includes education and support, and each of them. It will also include other purposes, which ought to be provided for." *Ibid.* As to the effect of the amendment, see Griswold, *SPENDTHRIFT TRUSTS*, 2d ed., §§65, 66 (1947).

⁵⁸² Rev. Stat. 1846, p. III; Weadock, "The Public Services of Sanford M. Green," 17 MICH. PIONEER AND HIST. COLLECTIONS, 2d ed., 357-369 (1910); Howell N.P. 308; 117 MICH. xlv. Green practiced at Brownsville, New York, 1833-1835, and married the daughter of a New York judge. He moved to Owosso, Michigan, in 1837 and became a state senator. He was a judge of the Michigan Supreme Court, 1848-1857, circuit judge at Pontiac, 1857-1867, and circuit judge at Bay City, 1872-1887.

substance, the provisions of the New York statutes quoted above, as they had been amended in 1830. This was enacted, with two changes, as Chapter 63 of the Michigan Revised Statutes of 1846, which became effective March 1, 1847, and is still in force.⁵⁸³ The two changes made by the legislature were in the section listing permissible trusts (Sec. 55, New York; Sec. 11, Michigan).⁵⁸⁴ Subsection 4 was amended to permit accumulations for married women, not limited to minority, and a new Subsection 5 was added. The section, as enacted and in force in Michigan reads,

“Sec. 11. Express trusts may be created for any or either of the following purposes:

1. To sell lands for the benefit of creditors:
2. To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon:
3. To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the last preceding chapter:
4. To receive the rents and profits of lands, and to accumulate the same *for the benefit of any married*

⁵⁸³ Comp. Laws (1857) §§2631 to 2657; Comp. Laws (1871) §§4114 to 4140; Comp. Laws (1897) §§8829 to 8855; How. Stat., §§5563 to 5589; Comp. Laws (1915) §§11565 to 11591; Comp. Laws (1929) §§12967 to 12993; Mich. Stat. Ann. §§26.51 to 26.77; Comp. Laws (1948) §§555.1 to 555.27. Sections 1, 3, 11, 13, 16, 19, 20, 21, and 24, Rev. Stat. 1846, c. 63, correspond, respectively, to §§45, 47, 55, 57, 60, 63, 64, 65, and 68, R.S.N.Y. 1829, part II, c. 1, tit. II, art. Second. Rev. Stat. 1846, c. 63, §2, copied from R.S.N.Y. 1829, part II, c. 1, tit. II, art. Second, §46, provides, “Every estate which is now held as an use, executed under the laws of this state as they formerly existed, is confirmed as a legal estate.” As the Statute of Uses was in force in New York prior to the revision of 1829, this section had extensive application there. It having been held in *Trask v. Green*, 9 Mich. 358 (1861) that the Statute of Uses was repealed in Michigan by the Act of September 16, 1810, note 38 *supra*, the section’s application here is limited to uses created before 1810.

⁵⁸⁴ Rev. Stat. 1846, p. V.

woman, or for either of the purposes and within the limits prescribed in the preceding chapter:⁵⁸⁵

5. For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed in this title.”⁵⁸⁶

The addition of Subsection 5 wholly altered the nature of the legislation. As has been seen, the New York revisers intended to abolish all continuing trusts except those for the support and education of minors, married women, and incompetents. Their provisions as to the nature and inalienability of the interest of the *cestui que trust* were inserted with this in mind. The original New York statute did not carry out this intention perfectly because it failed to define the persons who could be beneficiaries of a trust for education and support. Probably the revisers did not anticipate the creation of spendthrift trusts for the benefit of persons who were not incompetent. The New York amendment of Subsection 3, made in 1830, altered the scheme to some extent by permitting trusts, for the life of any *cestui que trust*, not limited to education and support. The Michigan addition of Subsection 5 changed it wholly by permitting trusts for any purpose whatever, so long as the *cestui que trust* is not in possession. Yet the Michigan statutes retain the provisions which make the interest of the *cestui que trust*

⁵⁸⁵Emphasis supplied to show words not in the New York subsection. The reference to the “preceding chapter” is to Rev. Stat. 1846, c. 62, §37; Comp. Laws (1857) §2621; Comp. Laws (1871) §4104; Comp. Laws (1897) §8819; How. Stat. §5553; Comp. Laws (1915) §11555; Comp. Laws (1929) §12957; Mich. Stat. Ann. §26.37; Comp. Laws (1948) §554.37, which was the same as N.Y. Rev. Stat. 1829, part II, c. 1, tit. II, art. First, §37, note 579 *supra*. This section [Comp. Laws (1948) §554.37] was amended by Act 227, P.A. 1949, and repealed by Act 6, P.A. 1952. Chapter 16, *infra*.

⁵⁸⁶Rev. Stat. 1946, c. 63, §11, note 583 *supra*.

an inalienable chose in action,⁵⁸⁷ despite their inappropriateness to trusts which are not for the education or support of minors, married women, or incompetents.

Both the New York and Michigan statutes abolish trusts of land under which the *cestui que trust* is entitled to beneficial possession.⁵⁸⁸ This eliminates several types of trust which would have been valid in England after the High Court of Chancery had created the exceptions to the Statute of Uses discussed above.⁵⁸⁹ These are the trust of an estate for years, the use on a use, and the trust under which the trustee has active duties. None of these was executed by the English Statute of Uses, whether or not the *cestui que trust* was entitled to possession. The New York and Michigan statutes execute them, that is, destroy the estate of the trustee and convert the interest of the *cestui que trust* into a legal estate, when the *cestui* is entitled to possession and the receipt of the rents and profits.

D. PERMISSIBLE DURATION OF TRUSTS OF LAND

English law imposes no limit on the duration of trusts. If a conveyance is made to A and his heirs upon trust for B and his heirs, A holds a legal fee simple and B an equitable fee simple, both of which are potentially perpetual. Inasmuch as the estates of both are alienable, B can terminate the trust at any time by having A convey to him, by conveying to A, or by joining A in a conveyance to a third party. When the estates of the trustee and the *cestui que trust* are inalienable, however, as they are in New York and Michigan in the case of

⁵⁸⁷ R.S.N.Y. 1829, part II, c. 1, tit. II, art. Second, §§57, 60, 63, note 580 *supra*; Rev. Stat. 1846, c. 63, §§13, 16, 19, note 583 *supra*.

⁵⁸⁸ R.S.N.Y. 1829, part II, c. 1, tit. II, art. Second, §47, note 580 *supra*; Rev. Stat. 1846, c. 63, §3, note 583 *supra*.

⁵⁸⁹ At notes 543-545.

trusts for the receipt of the rents and profits of lands,⁵⁹⁰ the trust is indestructible and some limit on duration is desirable. The language of Subsection 3 of the New York and Michigan statutes defining permissible trusts might have been construed to limit the duration of any trust created thereunder to the life of a single beneficiary. It has not been so construed in either New York or Michigan. However, the preceding article of the New York statutes provided,

"S. 15. The absolute power of alienation, shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section."⁵⁹¹

Before the Revised Statutes of 1846 were adopted, the New York courts had held that, because of the inalienability of the interest of the *cestui que trust*, a trust for the receipt of the rents and profits of lands suspended the absolute power of alienation, and, therefore, Section 15 limited the duration of such trusts to two lives in being.⁵⁹²

⁵⁹⁰ R.S.N.Y. 1829, part II, c. 1, tit. II, art. Second, §63, note 580 *supra*; Rev. Stat. 1846, c. 63, §19, note 583 *supra*, quoted in the text at note 621 *infra*.

⁵⁹¹ R.S.N.Y. 1829, part II, c. 1, tit. II, art. First, §15. Rev. Stat. 1846, c. 62, §15, Comp. Laws (1857) §2599; Comp. Laws (1871) §4082; Comp. Laws (1897) §8797; How. Stat. §5531; Comp. Laws (1915) §11533; Comp. Laws (1929) §12935; Mich. Stat. Ann., §26.15; Comp. Laws (1948) §554.15 was identical. The next section originally provided: "s. 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency, by which the estate of such persons may be determined before they attain their full age." The meaning and effect of §16 are discussed in Chapter 21, Section D, *infra*. Sections 554.14 to 554.20 of Mich. Comp. Laws (1948) were repealed by P.A. 38 in 1949. See note 594 *infra*.

⁵⁹² *Coster v. Lorillard*, 14 Wend. 265 (1835); *Hawley v. James*, 16 Wend. 61 (1836); PROPERTY RESTATEMENT *App.*, c. A, ¶17 (1944); see Powell and Whiteside, THE STATUTES OF THE STATE OF NEW YORK CON-

Section 15 was adopted here in 1846, and the decisions under it were to the same effect.⁵⁹³ A Michigan statute of 1949 repealed Section 15 and reestablished the common-law Rule Against Perpetuities as to interests in land created by wills becoming effective and deeds executed after September 23, 1949.⁵⁹⁴ This repeal raises the question of the permissible duration of a trust for receipt of the rents and profits of lands.

Subsection 3 permits only trusts, "to receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term." Although, as has been noted, this does not limit the duration of trusts, it does limit in quantity the equitable interest of any one beneficiary to a life interest. This being so, there can be no such thing as an equitable

cerning PERPETUITIES AND RELATED MATTERS 63-73 [New York Legislative Document (1936) No. 65 (H)].

⁵⁹³ *Palms v. Palms*, 68 Mich. 355, 36 N.W. 419 (1888); *Foster v. Stevens*, 146 Mich. 131, 109 N.W. 265 (1906); *Otis v. Arntz*, 198 Mich. 196, 164 N.W. 498 (1917); *Scheibner v. Scheibner*, 199 Mich. 630, 165 N.W. 660 (1917); *Grand Rapids Trust Co. v. Herbst*, 220 Mich. 321, 190 N.W. 250 (1922); *Burke v. Central Trust Co.*, 258 Mich. 588, 242 N.W. 760 (1932); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934); *In re Richards' Estate*, 283 Mich. 485, 278 N.W. 657 (1938). The types of trusts affected by §15 are discussed in Chapter 20, Section C, *infra*. The computation of the permissible period is discussed in Chapter 21, *infra*. In most of the cases the problem was complicated by contentions that not only the trust itself but future interests subject to it or expectant upon it offended section 15. It was held formerly that section 15 limited the duration of charitable trusts. *Methodist Episcopal Church of Newark v. Clark*, 41 Mich. 730, 3 N.W. 207 (1879); see *Scudder v. Security Trust Co.*, 238 Mich. 318, 213 N.W. 131 (1927). This effect of the section was eliminated by Act 122, P.A. 1907, superseded by Act 280, P.A. 1915, Comp. Laws (1915) §11099; Comp. Laws (1929) §13512; Mich. Stat. Ann., §26.1191; Comp. Laws (1948) §554.351, and supplemented by Act 373, P.A. 1925, Comp. Laws (1929) §13517; Mich. Stat. Ann. §26.1201; Comp. Laws (1948) §554.381. The history and present status of charitable trusts in Michigan are discussed in Chapter 15, *infra*.

⁵⁹⁴ Act 38, P.A. 1949, Mich. Stat. Ann. §§26.49 (1), 26.49 (2), 26.49 (3); Comp. Laws (1948) §§554.51, 554.52, 554.53. See *Miller v. Curtiss*, 328 Mich. 239, 43 N.W. (2d) 834 (1950).

fee simple under Subsection 3. There can be a succession of equitable life interests followed by a legal remainder in fee, but each life interest and the remainder must vest within the period of the common-law Rule Against Perpetuities which is, generally speaking, lives in being and twenty-one years. Thus the Rule Against Perpetuities, although not itself a rule limiting the duration of trusts, operates in conjunction with the language of Subsection 3 to impose what amounts to a limitation on the duration of trusts created under that subsection.

Subsection 5, which is peculiar to Michigan, permits trusts for "the beneficial interest of any person or persons subject to the limitations as to time prescribed in this title." The reference was to Section 15, now repealed, so it would seem that there is now no limitation on the duration of trusts created under this subsection; that is, the interest of the *cestui que trust* may be an equitable fee simple. As the interest of the *cestui que trust* under a trust for the receipt of the rents and profits of lands is inalienable, it becomes material to inquire whether it is permissible to create a trust for the receipt of the rents and profits of lands under Subsection 5. If so, it may now be possible to set up a perpetual trust of land under which the interest of the *cestui que trust*, although in fee simple, will always be inalienable, except to the extent that the statutes permit his creditors to reach the surplus of income beyond that necessary for his education and support.⁵⁹⁵ Such a trust would have

⁵⁹⁵ Rev. Stat. (1846) c. 63, §§13, 19, note 583 *supra*. These sections correspond to sections 57 and 63 of the New York statute, quoted in the text at note 580 *supra*. The *Restatement of Trusts* takes the position that a trust may not be made indestructible beyond the period of the common-law Rule Against Perpetuities. Section 62, comment *h* (1935). Professor Scott agrees with this position but cites no authority for it. LAW OF TRUSTS §62.10 (1939). This problem is discussed further in Chapter 15, Section B (4), *infra*. As England has not made trusts

the undesirable characteristics of the perpetually unbarrable entail, which the English courts abolished in 1472.⁵⁹⁶

Two types of trusts for the receipt of the rents and profits of land may possibly be sustainable under Subsection 5. Subsection 3 permits only trusts to "apply" the rents and profits of land to the use of any person. It could be argued that when the trust is to receive the rents and profits and *pay them over* to the *cestui que trust*, the trust falls under Subsection 5 rather than Subsection 3. The New York courts have decided that a trust to receive the rents and profits and *pay them over* to the beneficiary falls under Subsection 3,⁵⁹⁷ but these decisions might not be followed in Michigan because they were rendered after 1846 and because, as New York has no Subsection 5, the only alternative there to sustaining such trusts under Subsection 3 would be to hold them void. Subsection 3 permits trusts to apply the rents and profits of lands to the use of any person only "during the life of such person, or for any shorter term." It could be argued that, if the trust is to apply the rents and profits to the use of B and his heirs, it cannot be sustained under Subsection 3 but can be under Subsection 5. To maintain this argument it is necessary to assert that Subsection 3 does not prohibit the creation of any trust to apply the rents and profits of land to the use of beneficiaries so long as it is not created under that subsection. In view of the undesirability of permitting perpetual trusts under which the interest of the *cestui que trust* is inalienable, the

indestructible by statute and does not permit them to be made indestructible by restraints on alienation, the question cannot arise there.

⁵⁹⁶ *Taltarum's Case*, Y.B. 12 Edw. IV, Mich., pl. 25 (1472), note 67 *supra*.

⁵⁹⁷ *Leggett v. Perkins*, 2 N.Y. 297 (1849); *Cochrane v. Schell*, 140 N.Y. 516 (1894); *PROPERTY RESTATEMENT App.*, c. A, ¶18 (1944).

Michigan Supreme Court may hold that Subsections 3 and 4 are the only authority for the creation of trusts for the receipt of the rents and profits of lands. If so, the menace of perpetually inalienable equitable estates in fee simple will be averted.

E. STATUTORY INALIENABILITY OF INTERESTS

UNDER TRUSTS OF LAND

As to alienation by the trustee, the New York and Michigan statutes introduce three changes in the English law. First, when the trust is not contained or declared in the conveyance to the trustees, subsequent creditors of the trustee without notice of the trust may levy on the trust property free of the trust.⁵⁹⁸ The English rule was otherwise.⁵⁹⁹ Second, the legal estate of the trustee is not devisable and does not pass to the trustee's heir upon intestacy.⁶⁰⁰ As to this, also, the English rule was otherwise.⁶⁰¹ Third, when the trust is contained or declared in the conveyance to the trustee, a transfer by the trustee in breach of trust is absolutely void.⁶⁰² In England such a transfer effectively conveyed the legal title to the transferee, who took it subject to the trust.⁶⁰³

This provision that the trustee's transfer in breach of trust is a complete nullity, even when the *cestui que trust* requests a transfer, can cause seriously undesirable situa-

⁵⁹⁸ R.S.N.Y. 1829, part II, c. I, tit. II, art. Second, §64, note 580 *supra*; Rev. Stat. 1846, c. 63, §20, note 583 *supra*.

⁵⁹⁹ Note 550 *supra*.

⁶⁰⁰ R.S.N.Y. 1829, part II, c. I, tit. II, art. Second, §68, note 580 *supra*; Rev. Stat. 1846, c. 63, §24, note 583 *supra*.

⁶⁰¹ Note 550 *supra*.

⁶⁰² R.S.N.Y. 1829, part II, c. I, tit. II, art. Second, §65, note 580 *supra*; Rev. Stat. 1846, c. 63, §21, note 583 *supra*.

⁶⁰³ Note 551 *supra*. There can be no problem of a bona fide purchaser for value without notice of the trust in this situation because the declaration of trust in the trustee's chain of title is notice to purchasers from him.

tions where the trust property is salable but is deteriorating, requires repairs which the trustee cannot finance, or will produce no income without improvements which the trustee cannot finance or is not empowered to make. Under the English law, a conveyance by the trustee would carry the legal title and the concurrence of the *cestui que trust* would bar his interest.⁶⁰⁵ A statute enacted in 1887 was designed to ameliorate the situation by empowering the circuit court in chancery to authorize testamentary trustees without power of sale to sell the trust property free of trust and hold the proceeds in trust.⁶⁰⁶ The 1887 act provides however, that,

"No sale or conveyance of any kind shall be made of any property contrary to any specific provision in regard thereto contained in the deed of conveyance, or in the will under which the petitioner holds the said property."⁶⁰⁷

*Young v. Young*⁶⁰⁸ was a suit by trustees for permission to sell land in fee. The land was devised to the plaintiffs in trust to pay the rents and profits to named persons for ten years, if either of two children of the

⁶⁰⁵ See note 566 *supra*.

⁶⁰⁶ Act 233, P.A. 1887, as amended, Comp. Laws (1897) §§9234 to 9242. Re-enacted, Act 314, P.A. 1915, c. 19, §§62 to 70; Comp. Laws (1915) §§12716 to 12724; Comp. Laws (1929) §§14404 to 14412; Mich. Stat. Ann., §§27.1188 to 27.1196; Comp. Laws (1948) §§619.62 to 619.70; note 283 *supra*. Cf. Act 258, P.A. 1925, Comp. Laws (1929) §§13518 to 13521; Mich. Stat. Ann. §§26.1211 to 26.1214; Comp. Laws (1948) §§554.401 to 554.404, relating to charitable dispositions, note 224 *supra*.

⁶⁰⁷ Act. 233, P.A. 1887, §9; Act 314, P.A. 1915, c. 19, §70; Comp. Laws (1915) §12724; Comp. Laws (1929) §14412; Mich. Stat. Ann. §27.1196; Comp. Laws (1948) §619.70. The term "deed of conveyance" is explicable by the fact that the statute permits legal life tenants holding under deed or will to petition for sale of the fee, although it applies only to trustees under wills.

⁶⁰⁸ 255 Mich. 173, 237 N.W. 535 (1931). See *Garrison v. Hecker*, 128 Mich. 539, 87 N.W. 642 (1901); *Hall v. Williamson*, 304 Mich. 657, 8 N.W. (2d) 869 (1943). Cf. *Trustees of the M.J. Clark Memorial Home v. Jewell*, 240 Mich. 250, 215 N.W. 378 (1927).

testator should so long live, legal remainder to the two children for their lives, legal remainder in fee to their issue or the issue of the survivor of them. The will expressly denied the trustees power to sell and directed them to hold the property intact during the term of the trust. It also provided that the children should not have power to sell or mortgage during their lives. Before the ten years expired, a hotel building on the land burned and the trustees could not finance construction of any building which would produce income or pay the taxes without income. A decree directing sale and the substitution of the proceeds for the original trust property was affirmed after the expiration of the ten years. The court held that courts of equity have inherent power, independent of statute, to permit deviation from terms of trusts restricting alienation and that the quoted section of the 1887 act did not restrict this non-statutory power. The opinion does not refer to the section of the Revised Statutes which makes "absolutely void" every sale or conveyance by trustees in contravention of the trust⁶⁰⁹ and does not discuss the validity of the provisions of the will imposing a prohibition on alienation of the legal life estate of the children. The result reached in *Young v. Young* is clearly desirable and in harmony with the general Anglo-American law of trusts.⁶¹⁰ Nevertheless, it flatly contravenes the Michigan statutes. The decision amounts to a partial judicial repeal of the arbitrary and virtually unworkable system set up by the New York revisers and a return to the

⁶⁰⁹ Rev. Stat. 1846, c. 63, §21, note 583 *supra*, adopting R.S.N.Y. 1829, part II, c. 1, art. Second, §65, note 580 *supra*. The New York statute has been amended to permit the result reached in *Young v. Young*. N.Y. Real Property Law §105.

⁶¹⁰ TRUSTS RESTATEMENT §167 (1935); Scott, LAW OF TRUSTS §167 (1939).

principles of the English law of trusts, which those revisers sought to abolish.

*Bennett v. Chapin*⁶¹¹ was a suit to construe a will. The testatrix devised two lots and other property to her executors upon trust to provide for the education and support of her daughter during minority, then to pay her a thousand dollars a year until she reached the age of thirty-five, when the property was to be transferred to her. If the daughter died before reaching thirty-five, her issue were to succeed to her rights and, if she was not survived by issue, the property was to be conveyed to testatrix's husband. The will provided that the lots should not be sold for less than \$16,500. After the death of the testatrix's husband, the daughter, aged thirty-one and without issue, sued for a determination that she had power to terminate the trust and sell the two lots for \$10,000. A decree dismissing her bill was reversed. The court held that the daughter had an indefeasibly vested

⁶¹¹ 77 Mich. 526, 43 N.W. 893 (1889). See Part Two, note 466, *infra*. The case is not followed when there are non-consenting contingent beneficiaries. *Ward v. Ward*, 163 Mich. 570, 128 N.W. 761 (1910); *In re Dingler's Estate*, 319 Mich. 189, 29 N.W. (2d) 108 (1947). In *Blossom v. Anketell*, (D.C. Mich. 1921) 275 F. 947, the sole beneficiary was not allowed to terminate a trust, the terms of which did not entitle him to the principal during his life-time unless the trustees, in their discretion, chose to convey it to him. The decision seems inconsistent, in principle, with *Bennett v. Chapin*. In *Hunt v. Hunt*, 124 Mich. 502, 83 N.W. 371 (1900), land was devised to trustees to convert into personalty and pay the income to a son for life, then to pay over to the heirs, devisees or legatees of the son. It was held that the son was not entitled to terminate the trust. In *Conover v. Hewitt*, 125 Mich. 34, 83 N.W. 1009 (1900), land was conveyed to a trustee to apply the rents and profits to the use of William Fitzhugh during his life and after his death to apply them to the use of his wife and children during the life of the wife, remainder at her death to the children. After the death of William his widow released her interest to the other beneficiaries. They sued to compel immediate termination of the trust and were granted the relief sought. This decision goes further than *Bennett v. Chapin* by holding not only that the beneficiaries of a trust for receipt of the rents and profits of land may compel its termination but that one such beneficiary may transfer his interest to another.

estate in fee simple and that the restraint on alienation was void, citing *Mandlebaum v. McDonell*⁶¹² and a passage in Gray's *Rule Against Perpetuities* stating the English rule that when property is given to trustees to transfer to a beneficiary upon his reaching a certain age and there is no one else beneficially interested, the beneficiary may compel the trustees to convey to him before he reaches the specified age, despite the fact that termination will defeat a material purpose of the trust.⁶¹³ The opinion does not mention the Michigan statutes relative to trusts of land. That the decision is in conflict with those statutes is abundantly clear from the New York decisions on the point.⁶¹⁴ It is also in conflict with the rule generally followed in this country in the absence of statute.⁶¹⁵ In this case, as in *Young v. Young*, the result reached is desirable and in harmony with the English law of trusts.

*Fredericks v. Near*⁶¹⁶ was an action of assumpsit. The defendants conveyed land owned by them by the entirety to the plaintiff. The plaintiff and defendants entered into a substantially contemporaneous agreement providing that the plaintiff held as trustee for the purpose of selling the land and paying a debt owed by the defendant husband, and that the defendants jointly and severally agreed to pay any deficiency. Being unable

⁶¹² 29 Mich. 78 (1874), note 138 *supra*.

⁶¹³ The passage quoted by the court is in §120, 3d ed. (1915). It collects the English cases and follows the English view that all prohibitions on alienation, on legal or equitable interests, are void, except on the separate equitable estate of a married woman.

⁶¹⁴ See *Matter of Wentworth*, 230 N.Y. 176, 129 N.E. 646 (1920) and other cases cited in Griswold, *SPENDTHRIFT TRUSTS*, 2d ed., 526 (1947).

⁶¹⁵ *TRUSTS RESTATEMENT* §337, comments *j*, *k* (1935); 3 *SCOTT, LAW OF TRUSTS* §337.3 (1939); Griswold, *SPENDTHRIFT TRUSTS*, 2d ed., §513 (1947). This is known as the Rule in *Claflin v. Claflin* [149 Mass. 19, 20 N.E. 454 (1899)].

⁶¹⁶ 260 Mich. 627, 245 N.W. 537 (1932).

to effect a sale, the plaintiff, with the consent of the creditor, reconveyed the land to the defendants. The defendant husband was later discharged in bankruptcy. The plaintiff sought to hold the defendant wife liable personally on the assumption of liability in the trust agreement. A judgment for the defendants was affirmed, the court saying,

"We recognize the rule that a trustee, without the consent or acquiescence of the beneficiary, cannot surrender the trust estate, but, in the case at bar, the trustee, the *cestui que trust*, and settlors were all *sui juris*, and could, by mutual consent, terminate the trust and restore the *status quo*." ⁶¹⁷

This language appears to be a statement of the rule, which is well settled in England and in states where it has not been altered by statute, that the settlor and *cestui que trust* may always terminate a trust, even though termination will defeat a material purpose of the trust, provided the *cestui que trust* is fully competent and there are no other beneficiaries affected.⁶¹⁸ In New York this rule is not applicable to trusts for receipt of the rents and profits of land created under Subsections 3 and 4 because the statutes make the interests of both trustee and *cestui que trust* inalienable.⁶¹⁹ It would seem that the New York rule should apply in Michigan to trusts created under Subsections 3, 4, and 5, and that, if the opinion in *Fredericks v. Near* holds otherwise, it is wrong. The trust involved in the case was, however, created under Subsection 1 of the statute, and the right of the beneficiary was to receive a sum in gross. Conse-

⁶¹⁷ *Id.* at 631.

⁶¹⁸ TRUSTS RESTATEMENT §338 (1935); Scott, LAW OF TRUSTS §338 (1939). In England the consent of the settlor is not required.

⁶¹⁹ Note 614 *supra*.

quently the interest of the beneficiary was alienable by the express provisions of the statute, and the decision is sound on its facts.⁶²⁰

The statutory prohibition on voluntary alienation of the *cestui's* interest under a trust for the receipt of the rents and the profits of land has no express exceptions. It reads, "No person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest."⁶²¹ The decision in *Bennett v. Chapin*⁶²² makes an exception to the statute, permitting a *cestui que trust*, who is entitled to a conveyance of the trust property in fee upon reaching a stipulated age, to terminate prematurely a trust for the receipt of the rents and profits of lands. The New York courts hold that the statutory prohibition on voluntary alienation does not apply to the interest of a *cestui que trust* who was the settlor of the trust.⁶²³ The Michigan Supreme Court has given some indication that it may not follow this view.⁶²⁴ Apart from these two situations, there appears to be no exception to the statutory rule that the *cestui* of a trust for the receipt of the rents and profits of land cannot voluntarily alienate his interest.⁶²⁵

⁶²⁰ Rev. Stat. 1846, c. 63, §19, note 583 *supra*, corresponding to R.S.N.Y. 1829, part II, c. 1, tit. II, art. Second, §63, quoted at note 580 *supra*.

⁶²¹ Rev. Stat. 1846, c. 63, §19, note 583 *supra*. But see note 611 *supra*.

⁶²² Note 611 *supra*.

⁶²³ *Newton v. Hunt*, 134 App. Div. 325, 119 N.Y.S. 3 (1909), *affd.* 201 N.Y. 599, 95 N.E. 1134 (1909); see *Schenck v. Barnes*, 156 N.Y. 316, 50 N.E. 967 (1898.)

⁶²⁴ See *Hackley v. Littell*, 150 Mich. 106 at 116, 113 N.W. 787 (1907).

⁶²⁵ See *Palms v. Palms*, 68 Mich. 355 at 380, 36 N.W. 419 (1888); *Ward v. Ward*, 163 Mich. 570 at 575, 128 N.W. 761 (1910); *In re Allen's Estate*, 240 Mich. 661 at 664-665, 216 N.W. 446 (1927) (implying that the *cestui's* interest is not transmissible by will). But see *Alberts v. Steiner*, 237 Mich. 143, 211 N.W. 46 (1926), where the *cestui que trust* did not contest the validity of her mortgage and the mortgagee was allowed to reach the rents and profits. The opinion does not refer to the statute.

With regard to involuntary alienation, Chapter 63 of the Revised Statutes of 1846 provides,

"Sec. 13. When a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable in equity, to the claims of creditors of such person, in the same manner as other personal property which cannot be reached by an execution at law."⁶²⁶

As was to be expected, this provision was interpreted to mean that creditors cannot reach the rents and profits to the extent that they are necessary for the education and support of the *cestui que trust*.⁶²⁷ The right of creditors to reach the surplus was complicated by contradictory provisions of Chapter 90 of the Revised Statutes of 1846 which permitted judgment creditors of a *cestui que trust* to reach his interest under the trust, "except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant."⁶²⁸ If the provisions of Chapters 63 and 90 are read literally, it would appear that the interest of a *cestui que trust* under a trust for the receipt of the rents and profits of land could not be reached by his creditors at all if he was not the settlor

⁶²⁶ Note 583 *supra*.

⁶²⁷ *Cummings v. Corey*, 58 Mich. 494, 25 N.W. 481 (1885). In this case the life beneficiary, whose interest was in question, was also the trustee. The trust was created by the will of another.

⁶²⁸ Emphasis supplied. Rev. Stat. 1846, c. 90, §§24, 25. Repealed, Act 184, P.A. 1851. Reenacted, Act 120, P.A. 1855; Comp. Laws (1857) §§3478, 3479; Comp. Laws (1871) §§5060, 5061; How. Stat. §§6614, 6615; Comp. Laws (1897) §§436, 437. Reenacted, Act 314, P.A. 1915, c. 6, §4(6); Comp. Laws (1915) §12302; Comp. Laws (1929) §13944; Mich. Stat. Ann. §27.545(b); Comp. Laws (1948) 606.4(6). These sections correspond to R.S.N.Y. 1829, part III, c. 1, tit. 2, art. Second, §§38, 39. See: Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.105 (1952).

of the trust, and could be reached only as to the surplus income above his needs for education and support if he was the settlor.⁶²⁹ Such is not the present judicial interpretation. The courts hold that, if the *cestui que trust* was the settlor, Chapter 63 has no application and Chapter 90 has full application, so that the entire income, not merely the surplus above what is necessary for support and education, may be reached by creditors.⁶³⁰ If the *cestui que trust* was not the settlor, Chapter 90 has no application and Chapter 63 applies, so that the surplus of rents and profits beyond what is necessary for the support and education of the *cestui* is accessible in equity by his creditors.⁶³¹ Of course, in no case may his interest be reached by attachment at law.⁶³²

F. SPENDTHRIFT TRUSTS OF PERSONALTY

The New York statute "Of Uses and Trusts" is Article Second of Title II of Chapter I of Part II of the Revised

⁶²⁹ This was the result reached by the earlier New York cases. They are collected in Griswold, SPENDTHRIFT TRUSTS, 2d ed., §70n (1947).

⁶³⁰ Schenck v. Barnes, 156 N.Y. 316, 50 N.E. 967 (1898); Gilkey v. Gilkey, 162 Mich. 664, 127 N.W. 715 (1910).

⁶³¹ Spring v. Randall, 107 Mich. 103, 64 N.W. 1063 (1895). But in Gilkey v. Gilkey, note 630 *supra*, it was held that no part of the interest of the beneficiary under a trust for support from the rents and profits of land created by another could be reached to satisfy a decree for alimony. The court made no mention of either statute, saying merely that payment of alimony was not within the uses to which the trustee was authorized to apply the income. See notes 570, 573 *supra* as to the treatment of trusts for support in states where the law has not been altered by statute. See Sprague v. Moore, 130 Mich. 92, 89 N.W. 712 (1902).

⁶³² Trask v. Green, 9 Mich. 358 (1861); Allen v. Merrill, Lynch & Co., 223 Mich. 467, 194 N.W. 131 (1923). Neither may it be reached by execution at law, *id.*; Gorham v. Arnold, 22 Mich. 247 (1871), or by garnishment, Peninsular Savings Bank v. Union Trust Co., 127 Mich. 355, 86 N.W. 798 (1901). That is, the interest of a *cestui que trust* being purely equitable, is accessible to creditors only in equity. Obligations created by the trustee which bind the trust estate would seem, also, to be enforceable against the trust property only in equity. Feldman v. Preston, 194 Mich. 352, 160 N.W. 655 (1916). See: Packard v. Kingman, 109 Mich. 497 at 507-508, 67 N.W. 551 (1896).

Statutes of 1829. Title II is entitled, "Of the Nature and Qualities of Estates in Real Property, and the Alienation Thereof." Chapter I is entitled, "Of Real Property, and of the Nature, Qualities and Alienation of Estates Therein." This gives the impression that the statute was intended to govern only trusts of freehold estates in land. Nevertheless, Article First of Title II contains several provisions relative to estates for years, which it declares shall be chattels real,⁶³³ and the revisers' notes make it clear that they intended the section abolishing trusts which entitle the *cestui que trust* to possession⁶³⁴ to apply to trusts of estates for years.⁶³⁵ There seems never to have been any doubt that the section limiting the purposes for which trusts might be created did not apply to trusts of other types of personal property, and New York decisions rendered as late as 1862 held that the sections making the interest of the *cestui que trust* inalienable did not apply to such trusts.⁶³⁶ Nevertheless, on the basis of New York statutes governing personal property, it was settled in 1865 that the interest of the *cestui* of a trust for the receipt of income from personal property was subject to the same inalienability as that of the *cestui* of a trust for the receipt of the rents and profits of land.⁶³⁷

The Michigan statute "Of Uses and Trusts" is part of Title XIV of the Revised Statutes of 1846, which bears the same title as Chapter I of Part II of the New York Revised Statutes of 1829. Michigan never adopted

⁶³³ R.S.N.Y. 1829, part II, c. 1, tit. II, art. First, §5. Rev. Stat. 1846, c. 62, §5, is the same.

⁶³⁴ R.S.N.Y. 1829, part II, c. 1, tit. II, art. Second, §47. Rev. Stat. 1846, c. 63, §3, is the same.

⁶³⁵ 3 R.S.N.Y. 584 (ed. 1836).

⁶³⁶ The cases are collected in Griswold, SPENDTHRIFT TRUSTS, 2d ed., §69 (1947).

⁶³⁷ Graff v. Bonnett, 31 N.Y. 9 (1865).

the New York personal property statutes. Consequently the Michigan statute "Of Uses and Trusts," Chapter 63 of the Revised Statutes of 1846, has no application to trusts of personal property, other than chattels real, and they are governed by the English rules of equity, as modified by judicial decision.⁶³⁸ Moreover, when the trust instrument directs the trustee to convert land into personalty, the doctrine of equitable conversion applies, and the trust is treated as one of personal property, unaffected by the provisions of Chapters 62 and 63 of the Revised Statutes of 1846.⁶³⁹

If, then, a trust is of personal property, other than chattels real, or is treated as such, the normal Anglo-

⁶³⁸ Ledyard's Appeal, 51 Mich. 623, 17 N.W. 208 (1883); Hopkins v. Crossley, 132 Mich. 612, 96 N.W. 499 (1903); Moore v. O'Leary, 180 Mich. 261, 146 N.W. 661 (1914).

⁶³⁹ Penny v. Croul, 76 Mich. 471, 43 N.W. 649 (1889); Ford v. Ford, 80 Mich. 42, 44 N.W. 1057 (1890) (direction to convert Michigan land into Missouri land exempted trust from the statutes); Michigan Trust Co. v. Baker, 226 Mich. 72, 196 N.W. 976 (1924); Gettins v. Grand Rapids Trust Co., 249 Mich. 238, 228 N.W. 703 (1930); Floyd v. Smith, 303 Mich. 137, 5 N.W. (2d) 695 (1942); Van Tyne v. Pratt, 291 Mich. 626, 289 N.W. 275 (1939). These cases involved the question of whether Rev. Stat. 1846, c. 62, §15, note 591 *supra*, applied to the trusts involved, but the same result should be reached as to the application of Rev. Stat. 1846, c. 63, §§13, 19, note 583 *supra*. It was suggested in Thatcher v. Wardens and Vestrymen of St. Andrew's Church of Ann Arbor, 37 Mich. 264 (1877), that if the terms of a trust give the trustee power of sale, a trust does not offend Rev. Stat. 1846, c. 62, §15, regardless of duration. It does not follow that such a trust would cease to be one for receipt of the rents and profits of land and so free from the prohibition on alienation of the *cestui que trust's* interest imposed by Rev. Stat. 1846, c. 63, §§13, 19, until the land is actually sold. The suggestion in the Thatcher case was questioned in Palms v. Palms, 68 Mich. 355 at 386, 36 N.W. 419 (1888), and later overruled by a decision that a power of sale for reinvestment does not exempt a trust of land from the provisions of Rev. Stat. 1846, c. 62, §15. Niles v. Mason, 126 Mich. 482, 85 N.W. 1100 (1901). See Chapter 20, Section B (3) *infra*. Of course, if a trust of land is valid and the trustee actually does sell the land and reinvest in personalty under a power conferred on him by the terms of the trust, the trust ceases to be one for receipt of the rents and profits of land and the statutory prohibition on alienation of the beneficiary's interest imposed by Rev. Stat. 1846, c. 63, §§13, 19, ceases to operate.

American rules of equity apply to transfers of the legal title by the trustee, and the interest of the *cestui que trust* is freely alienable and accessible to his creditors unless the terms of the trust itself validly restrain alienation.⁶⁴⁰ As has been seen, the "spendthrift trust" doctrine accepted in most American states permits the imposition of a prohibitory restraint on alienation when the only rights of the *cestui que trust* are to receive the income from the trust property during his life or some shorter period.⁶⁴¹ When the *cestui que trust* also has rights in the principal, there is less harmony as to the validity of such a prohibitory restraint, especially when it purports to restrain alienation of the interest in the principal as well as the right to the income.⁶⁴²

*Hackley v. Littell*⁶⁴³ was a proceeding in equity, brought by the trustee, to set aside assignments of her interest made by a *cestui que trust*. In 1887 Mrs. Littell transferred \$50,000 to a trustee, to pay the income to her during her lifetime and transfer the principal to others upon her death. The trust instrument provided that Mrs. Littell could not anticipate, transfer, or assign any part of the income or principal. In 1901 the trustee sued Mrs. Littell in equity and in 1902 a decree was entered declaring that the trust was a valid spendthrift trust which Mrs. Littell had no right to terminate and under which she was entitled only to the income. In 1905 Mrs. Littell made several security assignments of her interest under the trust and the assignees claimed the income. A decree determining that the assignments were "void and of no effect," and directing the trustee

⁶⁴⁰ Alienability of *cestui's* interest: *Sprague v. Moore*, 130 Mich. 92, 89 N.W. 712 (1902).

⁶⁴¹ Note 569 *supra*.

⁶⁴² Notes 571, 572 *supra*.

⁶⁴³ 150 Mich. 106, 113 N.W. 787 (1907).

to continue paying the income directly to Mrs. Littell, was affirmed on the ground the 1902 decree was *res judicata* of the spendthrift character of the trust. All of the justices seemed to assume the validity of spendthrift trusts. One justice dissented on the ground that spendthrift provisions are ineffective as to the interest of a *cestui que trust* who is also the settlor; that is, that a person may not set up a spendthrift trust for himself.⁶⁴⁴ The majority of the court agreed that, in view of the provisions of Chapter 90 of the Revised Statutes of 1846,⁶⁴⁵ "one may not declare a trust in his own property, reserving a beneficial interest in himself, which interest shall not be subject to proceedings by a judgment creditor"⁶⁴⁶ but questioned whether the settlor of a trust may not bar his own voluntary alienation of his interest under it. The form of the litigation suggests a factor in the spendthrift trust problem which is seldom emphasized, that spendthrift provisions are often inserted in trust instruments not so much to protect the *cestui que trust* against his own folly as to protect the trustee against the trouble of dealing with the claims of creditors and assignees.

*Rose v. Southern Michigan National Bank*⁶⁴⁷ was a proceeding for approval of a compromise brought under a statute permitting the competent living persons whose interests will be affected to compromise any good faith contest of the admission of a will to probate, or any good

⁶⁴⁴ See note 574 *supra*; *Gilkey v. Gilkey*, 162 Mich. 664, 127 N.W. 715 (1910).

⁶⁴⁵ Note 628 *supra*.

⁶⁴⁶ 150 Mich. 116, 113 N.W. 791. Accord: *Gilkey v. Gilkey*, 162 Mich. 664, 127 N.W. 715 (1910).

⁶⁴⁷ 255 Mich. 275, 238 N.W. 284 (1931). Accord: *Hay v. LeBus*, 317 Mich. 698, 27 N.W. (2d) 309 (1947). It is not made certain in the opinion or the record in the *Rose* case that there was no land involved, but the will contained a direction to convert land to personalty. The *Hay* case involved a trust of both land and personalty.

faith controversy as to the construction of a will, subject to approval of the probate or circuit court.⁶⁴⁸ The statute provided for the appointment of a guardian ad litem to represent unborn and unascertained persons with contingent interests. The will involved, which was contested on the ground of mental incapacity of the testator, bequeathed personal property to a trustee to pay the income to the testator's son during his lifetime and, upon his death, to transfer the property to the then living lawful heirs of the testator. The will directed that the son's interest should not be liable for his debts. The compromise agreement provided that the property covered by the trust should be turned over to the son, free of trust. The trustee and the guardian ad litem for future contingent interests appealed from a decree approving the compromise. The decree was reversed on the grounds that the trust set up by the will was a spendthrift trust under which the beneficiary's interest was inalienable by virtue of Section 19 of Chapter 63, Revised Statutes of 1846, and that a court of equity has no power to terminate a spendthrift trust prematurely. The opinion overlooks the facts that the will imposed no restraint on voluntary alienation by the son and that

⁶⁴⁸ Act 249, P.A. 1921, Comp. Laws (1929) §§15581 to 15584; re-enacted, Act 288, P.A. 1939, c. 2, §§45 to 48; Mich. Stat. Ann. §§27.3178 (115-118); Comp. Laws (1948) §§702.45 to 702.48. Sec. 47 provides, in part, "such court shall, if such contest or controversy shall appear to be in good faith and if the effects of such agreement upon the estates and interests of the persons and interests so represented by any fiduciary or guardian ad litem *and upon any inalienable estate* or interest shall be found to be just and reasonable, make an order approving such agreement. . . ." Emphasis supplied. The underlined words were in the statute when the compromise involved in the Rose case was entered into. Compromise agreements modifying trusts without spendthrift provisions have been approved, even when the modification involved acceleration of payments to beneficiaries. *Metzner v. Newman*, 224 Mich. 324, 194 N.W. 1008 (1923); *Detroit Trust Co. v. Neubauer*, 325 Mich. 319, 38 N.W. (2d) 371 (1949).

Chapter 63 has no application to trusts of personal property. It also fails to distinguish between an attempt to terminate prematurely a valid trust and a compromise agreement made under the statute where there is real question as to whether the will creating the trust is valid. If the decision had been based on the unfairness of the agreement to the unascertained contingent remaindermen, no quarrel could be found with it. It would also be justified if based on a finding that the will contest was not in good faith but a mere subterfuge for getting rid of the spendthrift trust.⁶⁴⁹ The opinion as written seems unsound and leaves the law on the points involved in an unhappily confused state.

*In re Ford's Estate*⁶⁵⁰ was a proceeding under the statute involved in the *Rose* case for approval of a compromise agreement as to the construction of a will. The will provided that, on the death of the testator's widow, certain assets should be used to create two trusts, one for the benefit of each of the testator's sons and the issue of such son. It authorized the trustees, in their discretion, to pay \$100 a month from income to each son and directed them to pay a third of the corpus of his trust to each son on reaching 30, a third on reaching 35, and the balance on reaching 40. Other paragraphs provided,

"Should either or both of my sons at any time or times develop spendthrift or disorderly habits, my trustees are authorized and empowered to withhold from such son any part of the income and any part of the distributable corpus provided herein directed to be paid to any beneficiary.

"The trustee shall not be permitted nor authorized to

⁶⁴⁹ See Griswold, SPENDTHRIFT TRUSTS, 2d ed., §522 (1947).

⁶⁵⁰ 331 Mich. 220, 49 N.W. (2d) 154 (1951). The trustees had converted the real property in the estate into personalty before the date of the compromise agreement.

recognize any assignment of interest or principal herein directed to be paid to any beneficiary."

The testator died in 1942, when his son Milton was 29 and his son Melvin was 27. Milton died in 1944, after his thirtieth birthday. After Melvin reached 35, he, Milton's administratrix, guardians for the living children of the two sons, and the widow of the testator, entered into the compromise agreement, providing for immediate distribution of the entire corpus of Milton's trust, one-third to his estate and two-thirds to his child, immediate distribution of two-thirds of the corpus of Melvin's trust to him, the payment of the full income of the balance of Melvin's trust to him, and the distribution of the remaining corpus to him on reaching 40. A guardian ad litem for interested persons not in being appealed from a judgment approving the compromise on the grounds that the will did not authorize any distribution prior to the death of the testator's widow and that immediate distribution would constitute premature termination of spendthrift trusts. The judgment was affirmed on the ground that the trusts were not spendthrift trusts because of the *cestuis'* interest in principal. The decision appears to stand for the proposition that, if the *cestui* has an interest in the principal, spendthrift provisions are void, even as to his interest in income.

*Roberts v. Michigan Trust Co.*⁶⁵¹ was a suit to surcharge trustees for breach of trust. Catherine A. Peck bequeathed personal property valued at about \$415,000 to the Michigan Trust Company and Percy S. Peck, upon trust to pay the income to Percy S. Peck during his life-

⁶⁵¹ 273 Mich. 91, 262 N.W. 744 (1935). The trust consisted exclusively of personalty at the time it was created. The trustees later acquired real estate valued at \$1,579.68, evidently by foreclosure of a mortgage and a land contract.

time, remainder as he should by will appoint or, in default of appointment, to his issue. The will provided,

"No person beneficially interested in any legacy or devise given by this will to my said Trustee or Trustees shall have power to assign, convey, pledge, hypothecate or anticipate the payment of any sum or delivery of any property which may at any time be or become due or payable by way of income or principal, under the terms of this will; and if any such assignment, conveyance, pledge, hypothecation or other instrument by way of anticipation is executed, the same shall be void and of no effect, and shall not be recognized by my Trustee or Trustees, and it or they shall have power to withhold further payment to such person so beneficially interested in such legacy or devise, until such assignment, conveyance, pledge, hypothecation or other instrument shall be withdrawn or canceled, in such manner as shall be satisfactory to my said Trustee or Trustees."

The trustees lent \$162,000 of trust funds to Percy S. Peck, taking as security mortgages on land valued at about twice that amount which he owned individually. The children of Percy S. Peck brought this suit in their father's lifetime, contending that the loans to him were in violation of the spendthrift clause and impaired their interests as contingent remaindermen. The court held that the transactions in question did not violate the spendthrift clause, which the court treated as valid. The case is interesting in that it suggests the validity of a prohibitory restraint on alienation of a beneficiary's right to receive income for life, even though the beneficiary has a power of disposition of the remainder interest in the principal.⁶⁵² The particular spendthrift clause

⁶⁵² In re Peck Estates, 320 Mich. 692, 32 N.W. (2d) 14 (1948), involved the same trust. Percy S. Peck was adjudicated a bankrupt in 1935 and his interest under the trust assigned to the plaintiff by his trustee in bankruptcy. The court held no interest under the trust, in income or principal, passed to the trustee in bankruptcy.

is also interesting because it contained a provision for forfeiture on alienation as well as a general prohibition on alienation.⁶⁵³

*Wyrzykowski v. Budds*⁶⁵⁴ was a garnishment proceeding against a city to reach instalments of pension due the principal defendant, a retired city policeman. The pension fund, comprising employer and employee contributions, was established by the city charter, which provided that pensioners could not assign their rights and that pension payments due should not be subject to legal process for the debts of the pensioner. The writ was served after a check had been drawn in favor of the principal defendant but before it had been delivered to him. A judgment quashing the writ was affirmed. The court thought that the pension payments were gifts rather than income payable under a trust, but it sustained the validity of the charter provisions by analogy to like provisions of spendthrift trusts.

It is apparent from the cases that Michigan sustains the validity of spendthrift trusts of personal property. The precise limits of the spendthrift trust doctrine in this state have not yet been set. Whether as a matter of policy spendthrift trusts should be allowed, that is, whether prohibitions on alienation of equitable interests in property should be enforced, is gravely doubtful. As Dean Griswold has pointed out, the whole spendthrift trust doctrine in this country has probably grown up as a result of misunderstanding and confusion.⁶⁵⁵ Pro-

⁶⁵³ For an example of a discretionary trust, of the type which is used in England to serve the purpose of spendthrift trusts, because they are invalid there, see *Boyer v. Backus*, 282 Mich. 593, 276 N.W. 564 (1937).

⁶⁵⁴ 324 Mich. 731, 37 N.W. (2d) 686 (1949); *accord*: *Wyrzykowski v. City of Hamtramck*, 324 Mich. 738, 37 N.W. (2d) 689 (1949).

⁶⁵⁵ SPENDTHRIFT TRUSTS, 2d ed., §§25-32 (1947).

fessor John Chipman Gray's classic work on *Restraints on Alienation*⁶⁵⁶ is an eloquent attack on the whole doctrine, based on history, logic, and policy. No satisfactory answer to the arguments against spendthrift trusts advanced in the Preface to the Second Edition of that work has been made. Even if spendthrift trusts are to be allowed, there is no adequate reason for the distinctions which exist in this state between trusts of land and trusts of personal property. Some arguments can be made in favor of permitting the settlor of a trust to impose prohibitory restraints on the alienation of the interest of the *cestui que trust*. None can be advanced in favor of the Michigan statutes which make the interest of the beneficiary of a trust for receipt of the rents and profits of land inalienable even though the settlor wishes it to be alienable. Those statutes have caused much confusion. Their application to trusts which involve both land and personal property raises serious questions. Regardless of the desirability of spendthrift trusts, those statutes should be repealed.

G. CHARITABLE TRUSTS

As has been seen, although a condition subsequent in general restraint of alienation in a conveyance of legal title in fee simple to a private person is always void,⁶⁵⁷ such a condition in a conveyance of legal title in fee simple to a charitable or public corporation is valid.⁶⁵⁸ The same problem can arise as to a conveyance

⁶⁵⁶ (1st ed. 1885); (2d ed. 1895). See note 255 *supra* and Schnebly, "Restraints Upon the Alienation of Property," 6 AMERICAN LAW OF PROPERTY, §26.100 (1952).

⁶⁵⁷ Notes 108, 109 *supra*; *Mandlebaum v. McDonell*, 29 Mich. 78 (1874), note 138 *supra*.

⁶⁵⁸ Note 222 *supra*; *County of Oakland v. Mack*, 243 Mich. 279, 220 N.W. 801 (1928), note 223 *supra*; *Trustees of the M. J. Clark Memorial Home v. Jewell*, 240 Mich. 250, 215 N.W. 378 (1927).

to the trustee of a charitable trust. Michigan refused to enforce charitable trusts until they were authorized by statute in 1907.⁶⁵⁹ A statute enacted in 1925 provides that when land is conveyed to a charitable use, subject to such a condition, and it becomes impossible or impracticable to use the land in the manner specified, the circuit court may authorize sale of the land free of the condition of forfeiture.⁶⁶⁰ It would seem that such conditions in general restraint of alienation are still valid, however, and will entitle the grantor to assert a forfeiture upon alienation other than pursuant to the statute.

H. MORTGAGES AND EXECUTORY LAND CONTRACTS

The Mediaeval Church did not permit Christians to charge interest on a loan of money⁶⁶¹ or on the unpaid balance of the purchase price due under a sale on credit.⁶⁶² The Law of Moses prohibited Jews charging interest on loans to Jews⁶⁶³ but not on loans to Gentiles.⁶⁶⁴ As the Jews in England were liquidated or ex-

⁶⁵⁹ *Methodist Episcopal Church of Newark v. Clark*, 41 Mich. 730, 3 N.W. 207 (1879); *Wheelock v. American Tract Society*, 109 Mich. 141, 66 N.W. 955 (1896); *Hopkins v. Crossley*, 132 Mich. 612, 96 N.W. 499 (1903); *Gilchrist v. Corliss*, 155 Mich. 126, 118 N.W. 938 (1908); *McPherson v. Byrne*, 155 Mich. 338, 118 N.W. 985 (1909); *Stoepel v. Satterthwaite*, 162 Mich. 457, 127 N.W. 673 (1910); Act 122, P.A. 1907, note 593 *supra*; Chapter 15 *infra*.

⁶⁶⁰ Act 258, P.A. 1925; Comp. Laws (1929) §§13518 to 13521; Mich. Stat. Ann. §§26.1211 to 26.1214; Comp. Laws (1948) §§554.401 to 554.404, quoted in the text at note 224 *supra*.

⁶⁶¹ O'Brien, *AN ESSAY ON MEDIAEVAL ECONOMIC TEACHING* 166-193 (1920). The rule was based on Aristotle's theory of the sterility of money and upon LUKE, 6:34, 35 (Authorized Version 1611).

⁶⁶² O'Brien, *AN ESSAY ON MEDIAEVAL ECONOMIC TEACHING* 119 (1920). Similarly, it was sinful to charge a larger price in a credit sale than in a cash sale. *Id.* at 119, 187-189.

⁶⁶³ EXODUS, 22:25; LEVITICUS, 25:36, 37; DEUTERONOMY, 23:19 (Authorized Version 1611).

⁶⁶⁴ DEUTERONOMY, 23:20 (Authorized Version 1611).

iled under Edward I and Jews were not permitted in the country from then until the seventeenth century, their exemption from the ban was not a factor in the development of the later mediaeval law. Throughout the Middle Ages, English law reinforced the prohibition of canon law.⁶⁶⁵ Consequently, one in need could borrow money commercially only by means of a subterfuge. The needy landowner could make an outright sale of an estate for years; the needy merchant could sell a share in his business. The doctrine of just price would, of course, require such sales to be at that price.

Security transactions were permissible, so long as the lender did not seek interest. One early form was that of giving the lender a lease for years with a provision that he should have a fee if the loan was not repaid by the expiration of the term.⁶⁶⁶ A later form was substantially that of the modern mortgage, a conveyance in fee simple to the lender, subject to a condition subsequent which entitled the borrower to re-enter upon payment of the debt, or to a covenant by the lender that he would reconvey the fee upon payment of the debt.⁶⁶⁷ Under either form of mortgage the lender took possession immediately upon the execution of the mortgage and held it until the debt was paid in full. He was expected, in theory, to apply the entire rents and profits in reduction of the debt. In practice, mortgagees must have contrived to make a surreptitious profit out of their pos-

⁶⁶⁵ LEGES EDW. CONFESSORIS, c. 37 (1043; re-enacted, 1066; ed. 1840); Stat. 15 Edw. III, stat. 1, c. 5 (1341), 1 Statutes of the Realm 296; 3 Hen. VII, cc. 5, 6 (1487), 2 Statutes of the Realm 514, 515; 8 Holdsworth, HISTORY OF ENGLISH LAW 100-102 (1926).

⁶⁶⁶ 1 Coke, INSTITUTES 217a; 2 Pollock & Maitland, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 25, 117-122 (1895); Turner, THE EQUITY OF REDEMPTION 18 (1931).

⁶⁶⁷ 1 Coke, INSTITUTES 208a-208b; Turner, THE EQUITY OF REDEMPTION 18 (1931).

session of the mortgaged land, or such transactions would not have been as common as they were. In the condition type of mortgage in fee, the interest in the land retained by the mortgagor was a mere right of entry. In the covenant type his retained interest was a pure chose in action, a right to sue for specific performance of the covenant. Neither of these interests was alienable,⁶⁶⁸ and neither entitled the mortgagor to possession until the debt was paid in full. If the debt was not paid in full by the due date, the fee simple title of the mortgagee became absolute, and the mortgagor had nothing.

As commercial activity increased, the Church relaxed slightly in its attitude toward credit transactions, permitting a lender to receive damages if the debt was not paid on time, at least if he could show that he suffered loss due to the default.⁶⁶⁹ By the fifteenth century it was recognized that inability to take advantage of an opportunity for a profitable investment constituted such loss. As a merchant or trader could always show "loss" of this type, it became common to make gratuitous loans for very short periods with a provision for payment of interest in the form of liquidated damages, to begin on the nominal due date of the loan.⁶⁷⁰ In such a transaction neither party expected that the debt would be paid on the nominal due date. These ecclesiastical relaxations of the prohibition on interest were reflected in

⁶⁶⁸ 1 Coke, INSTITUTES, 210a; Turner, THE EQUITY OF REDEMPTION 19 (1931).

⁶⁶⁹ O'Brien, AN ESSAY ON MEDIAEVAL ECONOMIC TEACHING 184-187 (1920). If the penalty for default (*poena conventionalis*) was stated in the instrument evidencing the debt, the creditor could collect it without proof of damage; if not, he had the burden of proving injury (*damnum emergens*). The loss usually shown was some calamity which necessitated the creditor himself borrowing money.

⁶⁷⁰ *Id.* at 187-193; 8 Holdsworth, HISTORY OF ENGLISH LAW 103 (1926). Compensation for this type of loss was called "*lucrum cessans*."

an English statute of 1494.⁶⁷¹ Nevertheless, neither the Mediaeval Church nor the mediaeval law permitted a loan of money upon interest which was payable from the date of the loan.

The Protestant Reformation brought a change in attitude. Some of the reformers, notably Calvin and Melancthon, approved of interest at fair rates, and it had become evident to many that to permit the charging of interest at regulated rates was better than to drive borrowers to the use of subterfuges which really entailed greater expense to them. A statute of 1545 permitted charging up to ten per cent per annum interest on loans, including those secured by mortgage on land.⁶⁷² Some Protestant leaders retained the mediaeval attitude toward interest, however, and the statute was repealed in 1552.⁶⁷³ A statute of 1623 permitted collection of interest at not to exceed eight per cent per annum,⁶⁷⁴ and the charging of interest has been lawful, so far as the secular government is concerned, since then.

The permission to charge interest made it possible for a mortgagee to make a reasonable return on his investment without taking possession of the land. In the seventeenth century it became common for the mortgagee to permit the mortgagor to remain in possession until default. The mortgagor still had no right to possession in

⁶⁷¹ Stat. 11 Hen. VII, c. 8 (1494), 2 Statutes of the Realm 574.

⁶⁷² Stat. 37 Hen. VIII, c. 9, §§3, 4 (1545); 8 Holdsworth, HISTORY OF ENGLISH LAW 108-109 (1926).

⁶⁷³ Stat. 5 & 6 Edw. VI, c. 20 (1552). The statute imposed penalties of forfeiture of the sum lent, imprisonment, and fine for charging interest. The penalties were removed, where the interest did not exceed 10%, by 13 Eliz. c. 8, §§2, 5, 9 (1570) and 39 Eliz. c. 18, §§12, 33 (1597), but these statutes did not permit collection of the interest.

⁶⁷⁴ Stat. 21 Jac. I, c. 17, §2 (1623), made permanent, 3 Car. I, c. 4, §5 (1627). The rate was reduced to 6% by 12 Car. II, c. 13, §2 (1660), and to 5% by 12 Anne, stat. 2, c. 16, §1 (1713). All statutory restrictions on charging interest were repealed by 17-18 Vict. c. 90 (1854).

the absence of express agreement.⁶⁷⁵ So far as the law was concerned, the mortgagor in possession was a mere tenant at will or for years of the mortgagee.⁶⁷⁶ At common law, if the mortgage debt was not paid on the due date, the mortgagee became the absolute owner of the fee.⁶⁷⁷

By default in payment on the due date, the mortgagor was likely to lose his land for an inadequate consideration. In the course of the seventeenth century, the High Court of Chancery began to grant relief from these forfeitures, considering that interest was adequate compensation to the mortgagee for delayed payment. The mortgagor who had defaulted in payment and so had lost all his rights in the land at law was permitted to sue in equity for redemption. Upon payment of the debt, with interest, the mortgagee would be compelled to reconvey the land to the mortgagor.⁶⁷⁸ The High Court of Chancery did not, however, interfere with the mortgagee's right to possession pending full redemption.⁶⁷⁹ If the mortgage entitled him to possession from its date, he retained that right. If it entitled him to take possession on default, he could still do so, and could keep possession until redemption. The equity of re-

⁶⁷⁵ Turner, *THE EQUITY OF REDEMPTION* 88-90 (1931); see *Christophers v. Sparke*, 2 Jac. & W. 223 at 234, 37 Eng. Rep. 612 (1820).

⁶⁷⁶ Turner, *THE EQUITY OF REDEMPTION* 91-105 (1931).

⁶⁷⁷ 1 Coke, *INSTITUTES* 205a and Butler's Note 96 to 13th ed. (1787).

⁶⁷⁸ Turner, *THE EQUITY OF REDEMPTION* 17-42 (1931); *Master and Fellows of Emanuel College, Cambridge, v. Evans*, 1 Chan. Rep. 18, 21 Eng. Rep. 494 (1625). As a necessary corollary to this creation of an equity of redemption without definite limitation in duration, the High Court of Chancery developed a correlative remedy for the mortgagee who wanted his money. He could sue for foreclosure of the equity of redemption, that is, for a decree requiring the debtor to pay by a fixed date or lose his equity of redemption through sale of the land to satisfy the debt. *How v. Vigures*, 1 Chan. Rep. 32, 21 Eng. Rep. 499 (1628).

⁶⁷⁹ See *Marquis Cholmondeley v. Lord Clinton*, 2 Mer. 171, 359, 35 Eng. Rep. 905, 976 (1817).

demption was only a right of the mortgagor to pay the debt and recover the land after the due date of the mortgage.

It will be recalled that, at law, the rights of the mortgagor under the condition for re-entry or covenant for reconveyance were personal and inalienable.⁶⁸⁰ In Chancery, however, the equity of redemption became an equitable estate in land, equivalent in quantity to the mortgagor's former legal estate. It was as freely alienable⁶⁸¹ and devisable⁶⁸² as like legal estates. By the eighteenth century, Lord Hardwicke could say:

"An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin; the person therefore intitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets."⁶⁸³

The High Court of Chancery would not countenance any provision in a mortgage which would defeat, clog, or fetter the equity of redemption. In the words of Lord Northington,

"A mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not truly speaking, free

⁶⁸⁰ Note 668 *supra*.

⁶⁸¹ Notes 683, 686 *infra*. It was accessible, in equity, to the creditors of the mortgagor. *Cole v. Warden*, 1 Vern. 410, 23 Eng. Rep. 550 (1686); *Plucknet v. Kirk*, 1 Vern. 411, 23 Eng. Rep. 551 (1686).

⁶⁸² *Cooper v. Cooper*, Nelson 153, 21 Eng. Rep. 813 (1689).

⁶⁸³ *Casborne v. Scarfe*, 1 Atk. 603 at 605, 26 Eng. Rep. 377 (1737). There is similar language in *Frederick v. Aynscombe*, 2 Eq. Cas. Abr. 594, 22 Eng. Rep. 499 (1667-1744).

men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.”⁶⁸⁴

From these principles it followed that any provision in a mortgage restricting devolution of the equity of redemption upon the death of the mortgagor⁶⁸⁵ or restraining inter vivos alienation by him,⁶⁸⁶ is void. Even a provision giving the mortgagee an option to purchase the land for a fair price upon default is unenforceable.⁶⁸⁷ As the mortgagee is the legal owner of the land, his estate, too, is freely alienable.⁶⁸⁸

Most American states now treat the mortgagor as the legal owner of the land and the interest of the mortgagee as a mere lien. Where this is so, the validity of restraints on alienation of the mortgagor's interest is determined by the rules applicable to legal estates. Where the equity of redemption remains an equitable estate, the *Restatement of Property* takes the position that restraints on its alienation are valid only if a like restraint would be valid as to an equivalent legal estate.⁶⁸⁹ Such cases as

⁶⁸⁴ *Vernon v. Bethell*, 2 Eden. 110 at 113, 28 Eng. Rep. 838 (1762). Lord Hardwicke stated the rule in similar language in *Toomes v. Conset*, 3 Atk. 261, 26 Eng. Rep. 952 (1745), adding, “and the reason is, because it puts the borrower too much in the power of the lender, who, being distressed at the time, is too inclinable to submit to any terms proposed on the part of the lender.”

⁶⁸⁵ *Anonymous*, 2 Freeman 84, 22 Eng. Rep. 1073 (1681); *Ord v. Smith*, 2 Eq. Cas. Abr. 600, 22 Eng. Rep. 504 (1725). In the latter case the mortgagor's heir was allowed to redeem 26 years after default. The rule was otherwise at law. Littleton, *TENURES*, §337 (1481).

⁶⁸⁶ *Howard v. Harris*, 1 Vern. 190, 23 Eng. Rep. 406 (1683); see *Floyer v. Lavington*, 1 P. Wms. 268, 24 Eng. Rep. 384 (1714).

⁶⁸⁷ *Willett v. Winnell*, 1 Vern. 488, 23 Eng. Rep. 611 (1687); *Jennings v. Ward*, 2 Vern. 520, 23 Eng. Rep. 935 (1705); *Orby v. Trigg*, 9 Mod. 2, 88 Eng. Rep. 276, 2 Eq. Cas. Abr. 599, 22 Eng. Rep. 503 (1722) (pre-emptive option).

⁶⁸⁸ *Baker v. Kellet*, 3 Ch. Rep. 23, 21 Eng. Rep. 717 (1668); *Phillips v. Vaughan*, 1 Vern. 336, 23 Eng. Rep. 504 (1685); *Williams v. Springfield*, 1 Vern. 476, 23 Eng. Rep. 602 (1687).

⁶⁸⁹ Section 415 (1944).

there are appear to support this proposition.⁶⁹⁰ Therefore, if the equitable estate of the mortgagor is in fee simple, every prohibition on alienation or condition in general restraint of its alienation is void.

Before the Statute of Uses,⁶⁹¹ legal possessory estates in land could not be conveyed without a formal livery of seisin. In equity a bargain and sale, that is, an executed contract of present sale, raised a use in the bargainee. That is to say, although a mere agreement of present sale and payment of the purchase price did not transfer the legal title, the vendor stood seised to the use of the vendee. After the Statute of Uses, this use became a legal estate.⁶⁹² In consequence, after the statute the deed of bargain and sale became a common method of conveying the legal title to land.

In later centuries the High Court of Chancery, through the device of granting specific performance of executory contracts for the sale of land, developed the rights of the vendee under such a contract by analogy to the old rights of the bargainee under an executed bargain and sale. When a contract was entered into, binding the vendee to pay the purchase price in the future and the vendor to convey upon receipt of the price, the vendee became the owner in equity and the vendor a sort of trustee of the legal title. Lord Hardwicke stated the basis of the doctrine in these words:

“that which is contracted for valuable consideration to be done, will by the court be considered as done; all the consequences arising as if it had been so, and as if a

⁶⁹⁰ Goddard, “Non-Assignment Provisions in Land Contracts,” 31 MICH. L. REV. 1 at 6-8 (1932); *Campau v. Chene*, 1 Mich. 400 (1850), note 136 *supra*.

⁶⁹¹ Stat. 27 Hen. VIII, c. 10 (1535).

⁶⁹² *Tyrrrel's Case*, 2 Dyer 155a, 73 Eng. Rep. 336 (1557).

conveyance had been made of the land at the time to the vendee.”⁶⁹³

In holding that the vendee bears the risk of loss by fire, Lord Eldon said,

“for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heirs.”⁶⁹⁴

As these statements indicate, the rights of the vendee under an executory contract for sale of land are not a mere chose in action, they are an equitable estate in the land of the same duration as the legal estate contracted for. This being so, the equitable estate of the vendee is freely alienable and his transferee is entitled to specific performance of the contract against the vendor.⁶⁹⁵ As Lord Eldon put it,

“Being, as I say they were, the owners of the estate in equity, they had a right, . . . to sell such right, title, and interest as they had. . . . It is extremely clear that an equitable interest under a contract of purchase, may be the subject of sale.”⁶⁹⁶

It will be apparent that, as developed by the High Court of Chancery, the rights of a vendee under an

⁶⁹³ *Attorney-General v. Day*, 1 Ves. Sr. 218 at 220, 27 Eng. Rep. 992 (1748).

⁶⁹⁴ *Paine v. Meller*, 6 Ves. Jr. 349 at 352, 31 Eng. Rep. 1088 (1801). See *Capel v. Girdler*, 9 Ves. Jr. 509, 32 Eng. Rep. 700 (1804).

⁶⁹⁵ *Seton v. Slade*, 7 Ves. Jr. 265, 32 Eng. Rep. 108 (1802); *Wood v. Griffith*, 1 Swans. 43, 36 Eng. Rep. 291 (1818); *Nelthorpe v. Holgate*, 1 Coll. 203, 63 Eng. Rep. 384 (1844); see *Dyer v. Pulteney*, Barn. C. 160, 27 Eng. Rep. 596 (1740); *Anonymous v. Walford*, 4 Russ. 372, 38 Eng. Rep. 845 (1828).

⁶⁹⁶ *Wood v. Griffith*, note 695 *supra*, at 1 Swans. 53, 55-56, 36 Eng. Rep. 295 (1818). The vendor's interest is also alienable. *Turner v. Wright*, 4 Beav. 40, 49 Eng. Rep. 252 (1841); *Hadley v. The London Bank of Scotland, Ltd.*, 3 De G., J. & S. 63, 46 Eng. Rep. 562 (1865).

executory contract for the sale of land were virtually identical with those of a mortgagor under the type of mortgage which was, in form, an absolute conveyance in fee to a mortgagee who covenanted to reconvey upon payment of the debt secured. In each case the legal title was held as security for a debt and subject to a covenant to convey upon payment. In each case the beneficiary of the covenant was entitled to specific performance of it upon payment and, pending payment, was treated as equitable owner of the land, with full power of alienation *inter vivos* and by will. In each case the equitable owner was not entitled to possession prior to payment in full unless the terms of the transaction gave him such a right, and, if they did, his possession was merely that of a tenant for years or at will, subject to the restrictions which apply to such tenancies. In each case equity deemed time not to be of the essence and would compel conveyance even though the payment was not made on time.⁶⁹⁷ The one difference between them was that whereas, in the case of a mortgage, the High Court of Chancery would never give effect to any provision which tended to make time of the essence and so shorten or cut off the equity of redemption, in the case of the executory land contract, time could be made of the essence by express stipulation.⁶⁹⁸ Inasmuch as the typical English executory land contract contemplated a cash sale, so that cutting off the vendee's right to performance upon default in payment deprived him only of the bargain and, perhaps, a small deposit, whereas cutting off an equity of redemption meant allowing the mortgagee to have the land for an inadequate price, this difference is understandable and appropriate.

⁶⁹⁷ *Seton v. Slade*, note 695 *supra*.

⁶⁹⁸ *Ibid*.

The early Michigan cases treat the mortgage as it was treated in England. The mortgagee was entitled to take possession of the land upon default and to keep it until the mortgagor redeemed, without bringing foreclosure proceedings, and equity would not interfere with the mortgagee's doing so.⁶⁹⁹ The mortgagee could maintain an action of ejectment immediately upon default, without foreclosing.⁷⁰⁰ A statute of 1843 changed the situation as to mortgages of land by providing,

"That no action of ejectment shall hereafter be maintained by a mortgagee or his assigns or representatives, for the recovery of the mortgaged premises, until after a foreclosure of the mortgage, and the time for redemption thereof shall have expired."⁷⁰¹

The Michigan Supreme Court has given the statute a very broad interpretation, holding that it prevents the mortgagee from taking possession by self-help⁷⁰² and that it invalidates every provision in a mortgage which would give the mortgagee a right to possession or the rents and profits before foreclosure and the expiration

⁶⁹⁹ *Stevens v. Brown*, Walk. Ch. 41 (Mich. 1842); see *Stout v. Keyes*, 2 Dougl. 184 (Mich. 1845).

⁷⁰⁰ *Mundy v. Monroe*, 1 Mich. 68 (1848), holding Act. 62, P.A. 1843, unconstitutional insofar as it purported to deprive mortgagees under mortgages executed before its effective date of this right. As to chattel mortgages the old rule still prevails: the mortgagee may bring replevin immediately upon default. *Tannahill v. Tuttle*, 3 Mich. 104 (1854). See: *Daggett, Bassett & Hills Co. v. McClintock*, 56 Mich. 51, 22 N.W. 105 (1885); *Woods v. Gaar, Scott & Co.*, 93 Mich. 143, 53 N. W. 14 (1892).

⁷⁰¹ Act 62, P.A. 1843; superseded by Rev. Stat. 1846, c. 108, §61, Comp. Laws (1857) §4614; Comp. Laws (1871) §6263; How. Stat. §7847; Comp. Laws (1897) §11006; re-enacted, Act 314, P.A. 1915, c. 29, §54, Comp. Laws (1915) §13221; Comp. Laws (1929) §14956; Mich. Stat. Ann. §27.1967; Comp. Laws (1948) §629.54, which provides, "No action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the mortgaged premises, until the title thereto shall have become absolute upon the foreclosure of the mortgage."

⁷⁰² *Baker v. Pierson*, 5 Mich. 456 (1858); *Newton v. McKay*, 30 Mich. 380 (1874); *Albright v. Cobb*, 34 Mich. 316 (1876).

of the period of redemption allowed therein.⁷⁰³ Michigan has adopted the view that the mortgagor's interest is a legal estate and that of the mortgagee a mere lien.⁷⁰⁴

Michigan follows the English rule that the vendee under an executory contract for the sale of land is the equitable owner of the land.⁷⁰⁵ A land contract does not necessarily entitle the vendee to possession, and the act of 1843 has no application to land contracts. Therefore, a provision in a land contract which authorizes the vendor to take possession on default is valid.⁷⁰⁶ In consequence of these differences between

⁷⁰³ *Hazeltine v. Granger*, 44 Mich. 503, 7 N.W. 74 (1880); *Nusbaum v. Shapero*, 249 Mich. 252, 228 N.W. 785 (1930); *Equitable Trust Co. v. Milton Realty Co.*, 261 Mich. 571, 246 N.W. 500 (1933); *Bankers Trust Co. of Detroit v. Russell*, 261 Mich. 579, 246 N.W. 504 (1933); *American Trust Co. v. Michigan Trust Co.*, 263 Mich. 337, 248 N.W. 829 (1933); *Equitable Trust Co. v. Wetsman*, 264 Mich. 26, 242 N.W. 480 (1933); *Lambrecht v. Lee*, 264 Mich. 56, 249 N.W. 490 (1933); *Detroit Trust Co. v. Lipsitz*, 264 Mich. 404, 249 N.W. 892 (1933); *Reserve Loan Life Ins. Co. v. Witt*, 264 Mich. 536, 250 N.W. 301 (1933); *Union Guardian Trust Co. v. Commercial Realty Co.*, 265 Mich. 604, 251 N.W. 786 (1933); but see *Michigan Trust Co. v. Lansing Lumber Co.*, 103 Mich. 392, 61 N.W. 668 (1894); *Kelly v. Bowerman*, 113 Mich. 446, 71 N.W. 836 (1897); *First National Bank of Ionia v. Gillam*, 123 Mich. 112, 81 N.W. 979 (1900). Cf. *Hogsett v. Ellis*, 17 Mich. 351 (1868); *Wagar v. Stone*, 36 Mich. 364 (1877); *Beecher v. Marquette & Pacific Rolling Mill Co.*, 40 Mich. 307 (1879); *Fifth National Bank v. Pierce*, 117 Mich. 376, 75 N.W. 1058 (1898); *Straus v. Barbee*, 262 Mich. 113, 247 N.W. 125 (1933); *Bennos v. Waderlow*, 291 Mich. 595, 289 N.W. 267 (1939); *Lendzion v. Senstock*, 300 Mich. 346, 1 N.W. (2d) 567 (1942). The rule has been modified by a statute which permits a trust mortgage to contain an assignment of rents and profits. Act 228, P.A. 1925, Comp. Laws (1929) §§13498 to 13499; Mich. Stat. Ann. §§26.1131, 26.1132; Comp. Laws (1948) §§554.211, 554.212. There are numerous cases construing the statute.

⁷⁰⁴ *Dougherty v. Randall*, 3 Mich. 581 (1855); *Caruthers v. Humphrey*, 12 Mich. 270 (1864); See *Gorham v. Arnold*, 22 Mich. 247 at 250 (1871). Accord as to chattel mortgage: *Randall v. Higbee*, 37 Mich. 40 (1877). But as to the alienability of the interest of a chattel mortgagor, see note 455 *supra*.

⁷⁰⁵ *Bowen v. Lansing*, 129 Mich. 117, 88 N.W. 384 (1901).

⁷⁰⁶ *Belding v. Meloche*, 113 Mich. 223, 71 N.W. 592 (1897); *Smith v. Sherman*, 265 Mich. 590, 251 N.W. 920 (1933); see *Lendzion v. Senstock*, 300 Mich. 346, 1 N.W. (2d) 567 (1942). Cf. *Batty v. Snook*, 5 Mich. 231 (1858).

the mortgage and the land contract, it is common in Michigan to effect credit sales of land by means of executory land contracts instead of by conveyance to the vendee with purchase money mortgage back to the vendor. There is no doubt that the interest of the vendee under such a contract is alienable by assignment, subcontract, or conveyance in the absence of valid restraints on alienation imposed in the contract.⁷⁰⁷ The extent to which such restraints are effective is not so clear.

Waiver of provisions in land contracts which required assignments by the vendee to be made in a particular manner or only with the consent of the vendor has been found in a number of cases, without definite decision as to the validity of the provisions.⁷⁰⁸

*Welling v. Strickland*⁷⁰⁹ was a suit by the original vendee for specific performance of a land contract. The contract provided that the vendee should not assign the contract or sublet the farm or any part thereof without the written consent of the vendor, and that any breach would work an immediate forfeiture. The vendee sublet most of the farm without permission and defaulted in payments. The vendor took possession and notified the vendee that the contract was forfeited. Specific performance was denied, the opinion suggesting that the subletting alone was enough to work a forfeiture.

⁷⁰⁷ *Brin v. Michalski*, 188 Mich. 400, 154 N.W. 110 (1915); *Range v. Davison*, 242 Mich. 73, 218 N.W. 789 (1928). See: *Wing v. McDowell*, Walk. Ch. 175 (Mich. 1843) (mortgage).

⁷⁰⁸ *Peters v. Canfield*, 74 Mich. 498, 42 N.W. 125 (1889); *Maday v. Roth*, 160 Mich. 289, 125 N.W. 13 (1910); *Henze v. Saunders*, 215 Mich. 646, 184 N.W. 443 (1921); *Distasio v. Gervasio*, 234 Mich. 482, 208 N.W. 440 (1926); *Mueller v. Bankers Trust Co. of Muskegon*, 262 Mich. 53, 247 N.W. 103 (1933); *Whitley v. Tessman*, 324 Mich. 215, 36 N.W. (2d) 724 (1949). Cf. *Rathbun v. Herche*, 323 Mich. 160, 35 N.W. (2d) 230 (1948).

⁷⁰⁹ 161 Mich. 235, 126 N.W. 471 (1910).

*Rodenhouse v. De Golia*⁷¹⁰ was a suit to rescind an assignment of a land contract. In 1908 Langereis sold on land contract to Thomas. In August, 1913, Thomas sold to Vreeland by a subcontract providing that the vendee might not assign, transfer, lease, or sublet without the consent of the subvendor and for forfeiture on breach. Thomas later assigned the subvendor's interest under the subcontract to Langereis, the original vendor. In 1915 Vreeland assigned the subvendee's interest under the subcontract to De Golia, and the latter assigned it to Rodenhouse. These assignments were made without the consent of Langereis, and he refused to recognize them. Rodenhouse then sued De Golia to rescind the assignment to him. A decree granting rescission was affirmed.

*Cutler v. Lovinger*⁷¹¹ was a suit for specific performance of a subcontract for sale of land. Milligan sold the land to the defendants by a contract providing that they could not assign their interest without the consent of the vendor. The defendants, without Milligan's consent, contracted to assign their interest to the plaintiff. The defendants refused to perform on the ground Milligan would not consent. Milligan testified that he was willing to convey to the defendants upon payment of the balance due him. A decree for the plaintiff was affirmed, the court saying that the defendants could bind themselves by a contract to assign their interest even if an assignment would not be effective against Milligan. This seems obvious. One who owns no interest in land at all may bind himself by a contract to convey it. The decision demonstrates that a provision against assignment in a land contract will not be enforced as a prohibi-

⁷¹⁰ 198 Mich. 402, 164 N.W. 488 (1917).

⁷¹¹ 212 Mich. 272, 180 N.W. 462 (1920).

tion on alienation in the sense that an attempt by the vendee to alienate imposes no obligation upon him whatever.

*Hull v. Hostettler*⁷¹² was a suit for specific performance of a contract for exchange of lands. The defendants were to assign their interest as vendees under a land contract which contained a covenant against assignment without the consent of the vendor but no provision for forfeiture on breach. The defendants executed such an assignment but refused to complete the rest of the exchange. Their vendors intervened to assert a forfeiture of the contract for assignment without consent. A decree granting specific performance was affirmed, the court holding that such a provision against assignment does not prevent assignment and does not give a right of forfeiture on breach in the absence of specific provision therefor. The court implied that the vendors' remedy, if any, was by action for breach of covenant. This is a clear decision that a provision against assignment in a land contract will not be enforced as a prohibition on alienation. If valid at all, it can only be as a penalty restraint.

*Porter v. Barrett*⁷¹³ was a summary proceeding for possession of land. The plaintiffs sold land to Parent by a contract which provided, "This land is sold upon express condition that the . . . same shall never be sold or rented to a colored person." Parent assigned to Barrett with the consent of the vendors. Barrett, by separate executory contract, sold the land to Robinson, a colored person. The plaintiffs asserted a forfeiture for breach of the condition. A judgment for the defendants on pro-

⁷¹² 224 Mich. 365, 194 N.W. 996 (1923).

⁷¹³ 233 Mich. 373, 206 N.W. 532 (1925). Also discussed above at note 158.

cedural grounds was affirmed on the ground the condition was void as an illegal restraint on alienation of an estate in fee simple.

*William F. Nance Realty Co. v. Wood-Wardowski Co.*⁷¹⁴ was a suit to set aside foreclosure of a land contract and for specific performance. The defendants sold land to Nance by a contract which provided,

“no assignment or conveyance by the purchaser shall create any liability whatsoever against the seller until a duplicate thereof duly witnessed and acknowledged, together with the residence address of such assignee, shall be delivered to the seller and receipt thereof indorsed hereon.”

Nance quit-claimed his interest to the plaintiff corporation, of which he was president, without compliance with the quoted provision. There having been default in payments, the defendant instituted summary proceedings against Nance and secured a judgment of restitution. The amounts due were not paid within the grace period allowed by the statute authorizing such proceedings.⁷¹⁵ A decree dismissing the bill was affirmed. The decision does not enforce a forfeiture for violation of the provision against assignment; it merely holds that the plaintiff was not entitled to equitable relief from forfeiture for default in payments.

*Sloman v. Cutler*⁷¹⁶ was an action of assumpsit for payments due under a land contract. The plaintiffs,

⁷¹⁴ 242 Mich. 110, 218 N.W. 680 (1928).

⁷¹⁵ Act 314, P.A. 1915, c. 30, §25, as amended by Act 243, P.A. 1917; Comp. Laws (1915) §13253; amended, Act 373, P.A. 1927; Comp. Laws (1929) §14988; amended, Act 122, P.A. 1933; Mich. Stat. Ann. §27.1999; Comp. Laws (1948) §630.25. The grace period was 30 days when this case was decided. It was increased to 90 days by the 1933 amendment.

⁷¹⁶ 258 Mich. 372, 242 N.W. 735 (1932). *Accord*: *Zeidler v. Burlingame*, 260 Mich. 596, 245 N.W. 527 (1932); *Windmill Point Land Co. v. Jackson*, 269 Mich. 50, 256 N.W. 619 (1934).

husband and wife, sold land of the husband by a contract providing that the vendee might not assign without the consent of the vendors and for forfeiture on breach. The vendee assigned his interest to the defendant who, in consideration of the plaintiff husband's consent to the assignment, assumed performance of the vendee's obligations. The defendant contended that the provision against assignment was a void restraint on alienation, and, therefore, that the consent to assignment was not consideration for his undertaking. A judgment for the defendant was reversed, the court holding that such a restraint on assignment is valid while the contract remains executory as a protection to the vendor's security interest.

*Jankowski v. Jankowski*⁷¹⁷ was a suit to restrain summary proceedings for possession of land. The defendants sold land to the plaintiffs Jankowski by a contract which provided that the vendees should not assign or convey their interest or any part thereof without the consent of the vendors and for forfeiture on breach. The plaintiffs Jankowski, without the consent of the vendors, sold their interest by subcontract to the plaintiffs De Courval and later assigned the head contract to the De Courvals. The vendors declared a forfeiture for breach of the nonassignment clause and commenced the summary proceedings in question. A decree granting specific performance to the plaintiffs De Courval was affirmed. The court repeated the statement made in the opinion in *Sloman v. Cutler* that restrictions on assignment in a land contract are valid while the contract remains executory, "for the reason that the seller has a right to see that the property is kept in the hands of a respon-

⁷¹⁷ 311 Mich. 340, 18 N.W. (2d) 848 (1945).

sible person,"⁷¹⁸ but held that equitable relief from forfeiture under the facts of the case was appropriate.

The opinion in *Sloman v. Cutler* is the most extended discussion which the Michigan Supreme Court has made of the validity of provisions in land contracts restraining assignment. It was based on an *amicus curiae* brief prepared by Professor Edwin C. Goddard of the University of Michigan Law School, who later published his view that such provisions are valid.⁷¹⁹ His argument is by analogy to the lease for years, pointing out that the land contract vendor has an interest similar to that of the lessor in preventing waste. Professor Goddard was careful to observe, however, that "most cases hold that when the assignee tenders to the vendor full performance of the contract the vendor can no longer object,"⁷²⁰ which points to the fact that the vendee under a long-term executory land contract, like the mortgagor under the English decisions, has two distinct interests. One interest is purely legal. It includes his right at common law to have possession pending full payment, which is merely a legal estate for years, and his right to sue the vendor at law for damages for breach of contract. This legal interest may properly be made subject to strict forfeiture on alienation. The other interest, the right to specific performance in equity of the vendor's covenant to convey in fee upon full payment, is an equitable fee simple,

⁷¹⁸ *Id.* at 344.

⁷¹⁹ "Non-Assignment Provisions in Land Contracts," 31 MICH. L. REV. 1-15 (1932). See Grismore, "Effect of a Restriction on Assignment in a Contract," 31 MICH. L. REV. 299 at 316-319 (1933). Cf. Cornelius, LAW OF LAND CONTRACTS §§172, 173 (1922). Mr. Cornelius expresses understanding of the harshness and inequity of strict enforcement of such provisions. It is not solely a problem of logic but of the lives and life savings of people of modest means.

⁷²⁰ 31 MICH. L. REV. 1 at 13 (1932).

alienation of which should not be subject to restraint by any condition or penalty whatever.⁷²¹

An example will demonstrate the inequity of permitting forfeiture of the equitable fee. A professional man purchases a home on executory land contract for a total price of \$20,000, payable in instalments. When he has paid \$19,000, his health fails and he is unable to pay the balance. He assigns his interest to another who immediately tenders payment of the full balance. To allow the vendor to forfeit the contract, take back the house, and keep the \$19,000, would be grossly unfair. If he has such rights he is likely to exact a heavy pecuniary mulct for his consent to assignment; in effect, to get a larger price than that for which he agreed to sell. It was to prevent just such exactions that the statute *Quia Emptores Terrarum*⁷²² was enacted.

The decision in *Jankowski v. Jankowski* indicates that the Michigan Supreme Court appreciates the problem and has not forgotten its great decision in *Mandlebaum v. McDonell*.⁷²³ Nevertheless, the field of equitable relief against forfeiture of land contracts will require much extension and development before the land contract purchaser attains the degree of protection against oppression which courts of equity have afforded the mortgagor since the seventeenth century.

⁷²¹ This is substantially the position taken by the PROPERTY RESTATEMENT §416 and *comment e*.

⁷²² 18 Edw. I, stat. 1 (1290); notes 6, 104 *supra*.

⁷²³ 29 Mich. 78 (1874), note 138 *supra*.

PART TWO

THE COMMON-LAW RULE AGAINST PERPETUITIES

CHAPTER 9

Source, Nature and Local Reception

A. THE ENGLISH BACKGROUND

EVERY mature system of law which recognizes private property and permits its alienation has to contend with the man of property who seeks to found and endow a family by tying up his wealth so that his descendants will enjoy it in perpetuity without being able to dissipate it. If he is permitted to do so, the property involved is perpetually withdrawn from commerce and thus is unavailable for purchase by persons who could make better use of it than the descendants of the founder. Those descendants cannot mortgage or sell the property to meet urgent current needs and may be unable to use the property to their own best advantage because they cannot finance improvements by mortgage or by sale of a part. They are discouraged from making even those improvements which they can finance by their inability to sell or control more than a life interest in the property.¹ Moreover, the general existence of such perpetuities tends toward the concentration of the bulk of the community's wealth in a few families who constitute a hereditary aristocracy of wealth without obligation, and frequently without the motive or ability, to use it productively, with the consequent reduction of the rest of the population to a

¹ Scrutton, *LAND IN FETTERS*, (1886) is an eloquent exposition of the evils of such fetters. See also *PROPERTY RESTATEMENT*, Div. IV, Part I, *Introductory Note* (1944).

state of poverty and dependence. These disadvantages have led most systems of law to place some limitations on the creation of "perpetuities" or upon the duration of the restraints on alienation which they involve.²

Part One of this work describes the attempts of English landowners to create perpetuities by two methods, the entail and the direct restraint on alienation. After 1613 the entail could not be used to create a perpetuity because any tenant in tail could convey a fee simple by suffering a common recovery, and his power to do so could not be restricted by any prohibition, condition, or limitation.³ A perpetual prohibition on alienation of a fee simple would tend to create a perpetuity worse than an unbarrable entail because no tenant could convey even an estate for his own life. As has been seen, such prohibitions were void after the enactment of the statute *Quia Emptores Terrarum*.⁴ The common-law Rule Against Perpetuities, which is the subject of Part Two, was developed by the English courts to restrict the creation of perpetuities by a third method, the remote future interest.

² Butler's Note 77, V (7) to 1 Coke, *INSTITUTES*, 13th ed., 191a (1787); *Strickland v. Strickland*, [1908] A.C. 551. In English legal usage, the term "perpetuity" originally meant an unbarrable entail. The meaning was later extended to include the perpetual freehold, as to which see note 13, *infra*. In modern legal writing the term usually refers to a future interest the vesting of which is postponed to some remote time. Sweet, "Perpetuities," 15 L.Q.R. 71-85 (1899). The word has sometimes been used to describe a perpetual estate conveyed to an ecclesiastical corporation and a perpetually indestructible trust. All of these uses of the word involve situations in which the title to property is tied up in such a manner as to impede alienation for an extended period.

³ *Taltarum's Case*, Y.B. 12 Edw. IV, Mich., pl. 25 (1472), Part One, note 67 *supra*; *Portington's Case*, 10 Co. Rep. 35b, 77 Eng. Rep. 976 (1613), Part One, note 76 *supra*.

⁴ Statute of Westminster III, 18 Edw. I, stat. 1 (1290); Chapter 3 *supra*.

The sole freehold future estate known to the common law was the remainder.⁵ A remainder could be created only incident to the conveyance to a definite living person of a present possessory estate for life or in tail and so as to become possessory immediately upon the expiration of the preceding "particular" estate. Andrew Baker could not convey land to John Stiles effective after ten years or upon the death of Andrew.⁶ He *could* convey land to James Thorpe for life or in tail, remainder to John Stiles. A remainder could not be limited upon a fee simple. Andrew Baker could not convey to James Thorpe and his heirs, remainder to John Stiles and his heirs.⁷ A remainder could not be so limited as to cut off a

⁵ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §918 (1915). The common law recognized another type of freehold estate which was expectant as to possession, the reversion. Part One, note 356 *supra*. The reversion was looked upon, however, not as a future estate but as the unconveyed residue of a present estate. 1 Coke, *INSTITUTES* 22b (1628); 3 Sheppard, *ABRIDGMENT* 220 (1675). As tenure existed between the reversioner and the tenant of the particular estate, a reversion was a present seignior. Note, *R.S.Y.B.* 22 Edw. I, p. 641 (1294); 2 Coke, *INSTITUTES* 504 (1641). In any event a reversion cannot offend the common-law Rule Against Perpetuities because it is always deemed vested, even though expectant upon a particular estate in tail, for life or for years on special limitation. 2 Cruise, *REAL PROPERTY*, 1st Am. ed., 457 (1808); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§113-113b, 205, 283 (1915); 1 Simes, *LAW OF FUTURE INTERESTS*, §47 (1936); *PROPERTY RESTATEMENT*, §370, *Comment e.* (1944). It will be recalled that the statute *Quia Emptores Terrarum* forbade the retention of a reversion on a conveyance in fee simple. 2 Cruise *Id.* 455; Part One, note 354 *supra*.

⁶ *Hogg v. Cross*, Cro. Eliz. 254, 78 Eng. Rep. 510 (1591); *Barwick's Case*, 5 Co. Rep. 93b, 77 Eng. Rep. 199 (1598).

⁷ *Dean and Chapter of St. Paul's Case*, Dyer 33a, 73 Eng. Rep. 73 (1536); 1 Coke, *INSTITUTES* 18a (1628); 2 Sheppard, *ABRIDGMENT* 43, 3 *id.* 221, 226 (1675). See: Anonymous, Dyer 3b at 4a, 73 Eng. Rep. 8 at 9 (1527); *Willion v. Berkley*, 1 Plowden 223 at 248, 75 Eng. Rep. 339 at 379 (1559); *Wellock and Hammon's Case*, 2 Leon. 114, 74 Eng. Rep. 403-404 (1589); *Edward Seymour's Case*, 10 Co. Rep. 95b at 97b, 77 Eng. Rep. 1074 (1612); *Pills v. Brown*, Palm. 131 at 138, 81 Eng. Rep. 1012 at 1016 (1620); *Pell and Browne's Case*, 2 Roll. Rep. 216 at 220, 81 Eng. Rep. 760 at 763 (1620). But see: *Gardner v. Sheldon*, Vaughan 259 at 269, 124 Eng. Rep. 1064 at 1069 (1670). A remainder on a fee simple would not necessarily cut off the preceding estate prior

preceding estate prior to its normal expiration. Andrew Baker could not convey land to Lucy Baker for life but if Lucy remarry, remainder to John Stiles and his heirs.⁸ The mediaeval law would not permit a "gap in seisin" during which there would be no possessory freehold tenant responsible for the feudal duties owed by the land to its overlord. Hence a remainder could not be so limited as to take effect in possession at some time subsequent to the expiration of the preceding estate. Andrew Baker could not convey to James Thorpe for life, remainder two years after the death of James to John Stiles and his heirs.⁹

By 1550 it was settled that a remainder could be contingent, that is, subject to a condition precedent which might not occur at or before the expiration of the preceding particular estate.¹⁰ Because of the rule against

to its normal expiration because the fee simple might be on special limitation (e.g. to John Stiles and his heirs so long as London Bridge shall stand), and even a fee simple absolute may expire upon extinction of heirs, in which case there is an escheat.

⁸ Corbet's Case, 1 Co. Rep. 83b at 86b, 76 Eng. Rep. 187 at 195 (1600); 3 Sheppard, ABRIDGMENT 223 (1675). See Colthirst v. Bejushin, 1 Plowden 21a at 25a, 75 Eng. Rep. 33 at 39 (1550). This is a corollary of the rule that only the grantor or his heirs may take advantage of a condition subsequent. 1 Coke, INSTITUTES 214a (1628); Sheppard, TOUCHSTONE OF COMMON ASSURANCES 149 (1648). But a remainder may follow a particular estate on special limitation (e.g. to Lucy Baker during widowhood, remainder to John Stiles and his heirs). 1 Coke, INSTITUTES 214b (1628).

⁹ See Chudleigh's Case, 1 Co. Rep. 120a at 130a, 76 Eng. Rep. 270 at 296 (1595); Archer's Case, 1 Co. Rep. 66b, 76 Eng. Rep. 146 at 151-157 (1597); Boraston's Case, 3 Co. Rep. 19a at 21a, 76 Eng. Rep. 668 at 674 (1587). This rule led the courts to decide that where land was limited to a man for life, remainder to his son, a posthumous son could not take because of the gap in seisin between his father's death and his birth. The House of Lords held, however, that a posthumous son could take in remainder under a will. [Reeve v. Long, 1 Salk. 227, 91 Eng. Rep. 202 (1694)] and Stat. 10 & 11 Gul. III, c. 16 (1699) provided that he could do so under an inter vivos conveyance.

¹⁰ Colthirst v. Bejushin, 1 Plow. Comm. 21, 75 Eng. Rep. 33 (1550). A contingent remainder required a preceding *freehold* estate to support it; an estate for years would not do. Butler v. Bray, 2 Dyer 189b, 73 Eng. Rep. 418 (1560); Goodright v. Cornish, 1 Salk. 226, 91 Eng.

gaps in seisin, however, such a remainder could never take effect unless the condition precedent actually did occur at or before the termination of the preceding estate. For example, a remainder to a person not in being was subject to the condition precedent of the remainderman coming into being and could not take effect if he failed to do so at or before the expiration of the preceding estate. If Andrew Baker conveyed to James Thorpe for life, remainder to the eldest son of John Stiles, and James died before John had a son, the contingent remainder could never become effective, even though John later did have a son.¹¹ Moreover, this rule operated to destroy a contingent remainder if the preceding particular estate was extinguished or prematurely terminated before the remainder vested, that is, the condition precedent occurred. This happened if the tenant of the particular estate, whether for life or in tail, suffered a common recovery in fee simple, and in several other situations.¹² If Andrew Baker conveyed to John Stiles for life or in tail, remainder to the eldest son of John, John could destroy the contingent re-

Rep. 200 (1694). A vested remainder on a term of years (e.g. Andrew Baker to James Thorpe for ten years, remainder to John Stiles and his heirs) was valid not as a remainder but as a present estate subject to a possessory term. *Boraston's Case*, 3 Co. Rep. 19a, 76 Eng. Rep. 668 (1587).

¹¹ *Archer's Case*, 1 Co. Rep. 66b, 76 Eng. Rep. 146 (1597).

¹² *Idem.*; *Biggot v. Smyth*, Cro. Car. 102, 79 Eng. Rep. 691 (1628); *Purefoy v. Rogers*, 2 Wms. Saund. 380, 85 Eng. Rep. 1181 (1671); *Pigott*, COMMON RECOVERIES, 2d ed., 125 (1770); 1 *Fearne*, CONTINGENT REMAINDERS, 5th ed., *465-469 (1795). Any act by which the life tenant's estate was destroyed or turned into a mere right of action had this effect. There was destruction by forfeiture if the life tenant was convicted of treason or felony or made a feoffment or levied a fine in fee, and destruction by merger if he acquired the reversion or remainder following the contingent remainder. The life tenant's estate was turned into a mere right of action if he was disseized and the disseisor died.

mainder by suffering a common recovery before he had a son.

Before the destructibility of contingent remainders was settled, attempts were made to create perpetuities by means of the "perpetual freehold" or endless series of life estates. Andrew Baker might convey land to John Stiles for life, remainder to the eldest son of John for life, remainder to the eldest son of John's eldest son for life and so on, *ad infinitum*. If such attempts had succeeded in their purpose, the alienability of the fee simple would have been restrained forever; none of the successive tenants for life could have conveyed more than his life estate. They did not succeed. The courts held not merely that such contingent remainders were destructible but that those after the first were void *ab initio*; that a remainder could not be limited to the unborn child of an unborn life remainderman.¹³ The rule so established, sometimes called the Old Rule Against Perpetuities, meant practically that remainders following life estates in family settlements must become possessory within lives in being plus a period of gestation.

¹³ Haddon's Case, cited in Perrot's Case, Moore 368 at 372, 72 Eng. Rep. 634 at 637 (1594); Whitby v. Mitchell, L.R. 44 Ch. Div. 85 (1890); 1 Fearn, CONTINGENT REMAINDERS, 10th ed., 251, 565 (Butler's Note) (1844). See Chudleigh's Case, 1 Co. Rep. 120a at 138a, 76 Eng. Rep. 270 at 320 (1595); Sir Hugh Cholmley's Case, 2 Co. Rep. 50a at 51b, 76 Eng. Rep. 527 at 530 (1597); Duke of Marlborough v. Earl Godolphin, 1 Eden 404 at 415, 28 Eng. Rep. 741 at 745 (1759). But see: Manning and Andrews Case, 1 Leon. 256, 74 Eng. Rep. 234 (1576). The rule was applied to an equitable contingent remainder in *In re Nash* [1910] 1 Ch. 1. This rule, known variously as the Old Rule Against Perpetuities, the Rule Against Double Possibilities, and the Rule in *Whitby v. Mitchell*, has been a subject of controversy between legal scholars, who disagree as to whether it was superseded by the modern Rule Against Perpetuities. 2 Simes, LAW OF FUTURE INTERESTS. §486 (1936); Bordwell, "Alienability and Perpetuities V," 25 IOWA L. REV. 1, 16-22 (1939). In any event it has been abolished by statute in England [15 Geo. V, c. 20, §161 (1925)] and has not been applied in this country.

In the latter half of the seventeenth century, conveyancers perfected a device, called the strict settlement, which proved effective in preventing the destruction of contingent remainders.¹⁴ When his daughter Lucy married John Stiles, Andrew Baker might convey land to nominees to the use of John and Lucy for 99 years if either should so long live, remainder to the use of trustees for the lives of John and Lucy upon trust to preserve contingent remainders, remainder to the use of the unborn children of the marriage in tail. The Statute of Uses operated to transform the uses of John, Lucy, the trustees, and the unborn children into legal estates, but it did not execute the trust to preserve contingent remainders because it was a use on a use.

The result was that the trustees took a present vested estate *pur autre vie*, subject to the term of years of John and Lucy, with a legal contingent remainder in tail to the unborn children.¹⁵ As the trustees, not John and Lucy, held the particular estate, John and Lucy could

¹⁴ Sir Orlando Bridgman (chief justice of the Court of Common Pleas. 1660-1668; lord keeper, 1667-1672) and Sir Geoffrey Palmer have usually been credited with inventing the strict settlement. 2 Blackstone, COMMENTARIES, Cooley's 2d ed., 172 (1872); 7 Holdsworth, HISTORY OF ENGLISH LAW 112 (1926); Lord Hardwicke, L.C. in *Garth v. Cotton*, 3 Atk. 752 at 753-755, 26 Eng. Rep. 1231 at 1232-1233 (1753). One of Bridgman's early forms of strict settlement is reprinted in App. 3 to Holdsworth, *op. cit.*, at 547-559. Sir Frederick Pollock has pointed out, however, that the essentials of the device were in use a century before Bridgman. THE LAND LAWS, 3rd ed., 224 (1896).

¹⁵ Another form of strict settlement, which was more questionable, was a conveyance to the use of John for life, remainder to the use of trustees to preserve contingent remainders for the life of John, remainder to the use of John's unborn children. Logically the remainder to the trustees in this case would seem to be contingent and so destructible. Nevertheless it was held to be vested and indestructible as in the type of settlement described in the text. *Duncomb v. Duncomb*, 3 Lev. 437, 83 Eng. Rep. 770 (1697); see *Parkhurst v. Smith ex dem. Dormer*, 6 Brown 351, 2 Eng. Rep. 1127 (1740). A third form of strict settlement, which is clearly valid and more likely to be found in the

not destroy the contingent remainder.¹⁶ Although the trustees, as tenants of the particular estate, had legal power to destroy the contingent remainder, anyone who took title from them with knowledge of the trust or without paying a valuable consideration would be compelled in equity to recreate the contingent remainder.¹⁷ If the trustees conveyed to a bona fide purchaser for value, they could be compelled in equity to buy land of equal value and convey it to the wronged contingent remaindermen.¹⁸ Moreover, none of the contingent remaindermen could dock the entail during the lifetime of either of his parents or during his own minority because a common recovery could be suffered by a tenant in tail only after he was of age¹⁹ and with the cooperation of the tenant of the possessory freehold,²⁰ in this case the trustees. Andrew Baker's strict settlement could not be destroyed until John and Lucy were dead and their child who took the first remainder in tail was twenty-one years old. If the remainder in tail under a strict settlement was to a posthumous child, the settlement might be indestructible for lives in being plus a minority and a period of gestation.²¹ This was the most durable "perpe-

United States than the other two, is a conveyance to the use of trustees for the life of John upon trust for John *and* to preserve contingent remainders, remainder to the use of John's unborn children. See *Moody v. Walters*, 16 Ves. Jr. 283, 33 Eng. Rep. 992 (1809).

¹⁶ *Penhay v. Hurrell*, 2 Vern. 370, 23 Eng. Rep. 834 (1702); *Parkhurst v. Smith ex dem. Dormer*, 6 Brown 351, 2 Eng. Rep. 1127 (1740); *Garth v. Cotton*, 3 Atk. 752, 26 Eng. Rep. 1231 (1753).

¹⁷ *Pye v. Gorge*, 1 P. Wms. 128, 24 Eng. Rep. 323 (1710), *aff'd sub nom. Gorges v. Pye*, 7 Brown 221, 3 Eng. Rep. 144 (1712); see *Else v. Osborn*, 1 P. Wms. 387, 24 Eng. Rep. 437 (1717).

¹⁸ *Mansell v. Mansell*, 2 P. Wms. 678, 24 Eng. Rep. 913 (1732); see *Tipping v. Piggot*, 1 Eq. Cas. Abr. 385, 21 Eng. Rep. 1120 (1711).

¹⁹ *Pigott*, COMMON RECOVERIES, 2d ed., 60 (1770).

²⁰ *Parkhurst v. Smith ex dem. Dormer*, 6 Brown 351, 2 Eng. Rep. 1127 (1740); *Pigott*, COMMON RECOVERIES, 2d ed., 28, 41 (1770).

²¹ *Digby*, HISTORY OF THE LAW OF REAL PROPERTY, 5th ed., 365 (1897). See *Reeve v. Long*, 1 Salk. 227, 91 Eng. Rep. 202 (1694); Stat. 10 & 11 Gul. III, c. 16 (1699).

tuity" which could be created by means of the contingent remainder.

For centuries the ingenuity of English conveyancers was devoted to attempts to establish perpetuities by creating indestructible future interests in remote unborn generations. Some of these failed. Because a tenant for years could not suffer a common recovery, an entail of a term would be unbarrable. It was held that a term of years could not be entailed and that an attempt to entail one gave the whole term to the first taker.²² Future interests created by way of use executed by the Statute of Uses or devise under the Statute of Wills, if so limited as to become possessory upon the expiration of a preceding estate of freehold, were held to be contingent remainders, destructible as such.²³ When the fee simple was conveyed to trustees upon trust for an equitable tenant in tail, the *cestui que trust* in tail could bar the entail and destroy future interests limited to follow, or in defeasance of, the estate tail by suffering a common recovery.²⁴

Some of the conveyancers' attempts to create indestructible future interests in unborn generations succeeded. Although in strict common-law theory there is no such thing as a remainder in personal property, it

²² *Tatton v. Mollineaux*, Moore K.B. 809, 72 Eng. Rep. 920 (1610); *Lovies's Case*, 10 Co. Rep. 78a, 77 Eng. Rep. 1043 (1613); *Sanders v. Cornish*, Cro. Car. 230, 79 Eng. Rep. 801 (1631); *Grig v. Hopkins*, 1 Sid. 37, 82 Eng. Rep. 955 (1661).

²³ *Chudleigh's Case*, 1 Co. Rep. 120a, 76 Eng. Rep. 270 (1595); *Archer's Case*, 1 Co. Rep. 66b, 76 Eng. Rep. 146 (1597); *Smith v. Belay*, Cro. Eliz. 630, 78 Eng. Rep. 870 (1597); *Purefoy v. Rogers*, 2 Wms. Saund. 380, 85 Eng. Rep. 1181 (1671).

²⁴ *North v. Way*, 1 Vern. 13, 23 Eng. Rep. 270, *sub nom.* *North v. Williams*, 2 Ch. Ca. 63, 78, 22 Eng. Rep. 848, 855 (1681); *Brydges v. Brydges*, 3 Ves. Jr. 120, 30 Eng. Rep. 926 (1796). Similarly a *cestui que trust* in tail could bar his issue by levying a fine as fully as if he had the legal estate. *Basket v. Pierce*, 1 Vern. 226, 23 Eng. Rep. 431 (1683).

was possible by will to limit chattels real or personal to one person for life, with future interests following which could not be destroyed by the first taker. If Andrew Baker devised a term of 500 years to John Stiles for life and then to the eldest son of John, John could not destroy the executory interest of the unborn son.²⁵ Future interests created by way of use executed by the Statute of Uses or devise under the Statute of Wills which could not have taken effect as remainders because they followed a fee simple, cut off a preceding estate prior to its normal expiration, or created a gap in seisin were held valid and, if not preceded by an estate tail, indestructible by holders of prior interests. If Andrew Baker conveyed or devised land "to James Thorpe and his heirs but if James die in the lifetime of John Stiles then to John and his heirs," James could not destroy the executory interest of John.²⁶ Equitable future interests subject to a trust, whether or not they could take effect as remainders, and whether in land or personalty, were indestructible by holders of prior equitable interests not in tail; if Andrew Baker conveyed land to trustees upon trust for John Stiles for life and then for the eldest son of John in tail, John could not destroy the equitable contingent remainder of his unborn son.²⁷

The decisions that executory interests and equitable

²⁵ *Matthew Manning's Case*, 8 Co. Rep. 94b, 77 Eng. Rep. 618 (1609).

²⁶ *Pells v. Brown*, Cro. Jac. 590, 79 Eng. Rep. 504 (1620); *Pigott*, COMMON RECOVERIES, 2d ed., 127, 134 (1770).

²⁷ *Hopkins v. Hopkins*, 1 Atk. 581, 26 Eng. Rep. 365 (1738); *Attorney-General ex rel. University of Cambridge v. Lady Downing*, Wilm. 1, 97 Eng. Rep. 1 (1767); *Astley v. Micklethwait*, L.R. 15 Ch. D. 59 (1880). See: *Cole v. Moore*, Moore K.B. 806, 72 Eng. Rep. 917 (1607); *Symance v. Tattam*, 1 Atk. 613, 26 Eng. Rep. 385 (1737). As has been seen, however, an equitable tenant in tail could bar equitable remainders following the estate tail, whether vested or contingent, by suffering a common recovery. Note 24 *supra*.

future interests were indestructible would have made possible the perpetual tying up of land in a family had not the English courts, in a long series of cases which was not complete until the nineteenth century, created the modern common-law Rule Against Perpetuities.²⁸ The Rule in its developed form, unlike the old restrictions on contingent remainders, did not limit the time when future interests must become possessory.²⁹ It was phrased rather in terms of remoteness of vesting. Every indestructible future interest must be so limited that it must necessarily vest, if at all, within lives in being plus one or more actual periods of gestation, plus an actual minority or twenty-one years in gross. Any future interest not so limited was void. Andrew Baker could convey or devise land to John Stiles for life, remainder to the eldest son of John in fee simple, but if such eldest son died during his minority then to the eldest son of John's eldest son in fee simple. This would be valid even though both the eldest son of John (who took a contingent remainder) and *his* eldest son (who took a shifting executory interest) were posthumous. Andrew Baker could convey or devise land to John Stiles for life, then to Lucy Baker for 21 years, then to the oldest living descendant of John in being at the expiration of the 21 years. The Rule permitted some perpetuities which

²⁸ For detailed historical studies of the development of the modern Rule Against Perpetuities see Challis, *LAW OF REAL PROPERTY*, 3rd ed., 180-200, 205-217 (1911); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., c. 5 (1915); 7 Holdsworth, *HISTORY OF ENGLISH LAW* 215-228 (1926); Simes, *LAW OF FUTURE INTERESTS*, §§477-489 (1936). *PROPERTY RESTATEMENT*, Div. IV, Part I, Introductory Note and §374, *Comment a* (1944) contain a shorter account of the development.

²⁹ E.g. if Andrew Baker conveys to Lucy Baker in fee simple but, if Lucy die unmarried, to James Thorpe in fee tail, remainder to John Stiles in fee simple, the limitation to John Stiles does not violate the Rule because it must *vest*, if at all, on the death of Lucy, although it may not become *possessory* for centuries. Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §206 (1915).

were indestructible for slightly longer than the strict settlement. Its detailed application will be considered in subsequent chapters.

B. MICHIGAN'S RECEPTION OF THE RULE

The common law of England was received as the law of Michigan in the last decade of the eighteenth century.³⁰ By this time the modern Rule Against Perpetuities had become part of the English common law, its general nature was well understood, and most of its applications were either settled or foreseeable. There is no doubt that, in receiving the common law, Michigan received the Rule Against Perpetuities.

By the end of the seventeenth century it had been settled that a future interest which must necessarily vest within lives in being plus an actual minority plus one or more actual periods of gestation did not offend the rule.³¹ It had also been settled that a future interest which must necessarily vest within lives in being plus one year in gross did not violate the Rule.³² When English law came to Michigan, the only question relative to the permissible period of postponement of vesting under the Rule Against Perpetuities which was still undecided was that of the maximum allowable number of years in gross. Before that numerous dicta had suggested that

³⁰ Either by Stat. 32 Geo. III (Upper Canada), c. 1, §3 (1792), Part One, note 33 *supra*, or by the Law of the Northwest Territory of July 14, 1795, Laws of the Territory of the United States North-West of the Ohio, 175, 176 (1796), Part One, note 34 *supra*. *Stout v. Keyes*, 2 Doug. 184 (Mich. 1845); *Lorman v. Benson*, 8 Mich. 18 (1860); *Reynolds v. McMullan*, 55 Mich. 568, 22 N.W. 41 (1885), Part One, note 41 *supra*.

³¹ *Taylor v. Biddall*, 2 Mod. 289, 86 Eng. Rep. 1078 (1678); *Reeve v. Long*, 1 Salk. 227, 91 Eng. Rep. 202 (1694).

³² *Loyd v. Carew*, Prec. Ch. 72, 24 Eng. Rep. 35 (1697); *Marks v. Marks*, 10 Mod. 419, 88 Eng. Rep. 789 (1718).

this was twenty-one years.³³ Sir William Blackstone in his *Commentaries*, published in 1766 and vastly influential in America, adopted the same view,³⁴ and this was established as the law of England by a decision in 1833.³⁵ Such a decision was predictable when Michigan adopted the common law, and the rule it announced may be considered as part of that law.³⁶

As has been seen, the modern common-law Rule Against Perpetuities was developed to prevent the creation of perpetuities by means of executory interests and equitable contingent remainders, both of which future interests were indestructible by the tenant in possession. When Michigan received the common law, the English courts had not yet decided that the Rule applied to legal contingent remainders in land,³⁷ but it was evi-

³³ *Massingberd v. Ash*, 2 Ch. Rep. 275 at 282-283, 21 Eng. Rep. 677 at 679 (1685); *Goodtitle ex dem. Gurnall v. Wood*, Willes 211 at 213, 125 Eng. Rep. 1136 at 1137 (1740); *Duke of Marlborough v. Earl Godolphin*, 1 Eden 404 at 418, 28 Eng. Rep. 741 at 746 (1759); *Goodman v. Goodright ex dem. Williams*, 2 Burr. 873 at 879, 97 Eng. Rep. 608 at 611 (1759); *Buckworth v. Thirkell*, 3 B.&P. 652, note, 127 Eng. Rep. 351 at 353 (1785); *Jee v. Audley*, 1 Cox 324 at 325, 29 Eng. Rep. 1186 at 1187 (1787).

³⁴ 2 Blackstone, *COMMENTARIES*, 1st ed., 174 (1766). As to the influence of Blackstone in this country, see Cahill, *JUDICIAL LEGISLATION* 9 (1952).

³⁵ *Cadell v. Palmer*, 1 Cl. & F. 372, 6 Eng. Rep. 956 (1833).

³⁶ *PROPERTY RESTATEMENT*, Div. IV, Part I, *Introductory Note*, p. 1441 (1944).

³⁷ It had long been assumed that equitable contingent remainders, because they were indestructible, were subject to the Rule Against Perpetuities, and this was decided in *Abbiss v. Burney*, 17 Ch. D. 211 (1881). English writers differed as to whether legal contingent remainders were properly subject to the Rule. Challis, *LAW OF REAL PROPERTY*, 3rd ed., 197-200, 213-217 (1911); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§284-298 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §505 (1936). That they are subject to the rule was indicated by several judicial dicta [*Cattlin v. Brown*, 11 Ha. 372 at 374, 68 Eng. Rep. 1319 at 1320 (1853); *Re Frost*, 43 Ch. D. 246 at 254 (1889)] and definitely decided in *Re Ashforth*, [1905] 1 Ch. 535. Accord: *Whitby v. Von Luedecke*, [1906] 1 Ch. 783. Stat. 15 Geo. V, c. 20, §1 and First Schedule, Part I (1925) transformed all contingent remainders into equitable estates, so the question can no longer arise in England.

dent that the policy underlying the Rule extended to contingent remainders which are indestructible. Michigan statutes have made legal contingent remainders indestructible by the tenant in possession since 1838.³⁸

*St. Amour v. Rivard*³⁹ was a suit to construe the will of a testator who died in 1841. As interpreted by the Supreme Court, the will purported to devise life estates in land to nine persons with contingent remainders for life to the children of the first tenants, remainders for life to the children of the children, and so on forever. This, then, was an attempt to create a "perpetual freehold" or endless series of life estates in successive generations. As has been seen, the English courts thwarted such attempts in the sixteenth century by devising the so-called Old Rule Against Perpetuities, the rule that a contingent remainder could not be limited to the child of an unborn life remainderman.⁴⁰ The Michigan Court, after carefully distinguishing between contingent remainders and executory interests, tracing the development in England of the modern common-law Rule Against Perpetuities through 1833 and noting that it was developed primarily to restrict executory interests, held the devises void *in toto* for violation of the modern common-law Rule. This decision appears to stand for four important propositions: (1) Michigan received the

³⁸ Rev. Stat. 1838, p. 258, §4; Rev. Stat. 1846, c. 62, §32; Comp. Laws (1857) §2616; Comp. Laws (1871) §4099; Comp. Laws (1897) §8814; How. Stat., §5548; Comp. Laws (1915) §11550; Comp. Laws (1929) §12952; Mich. Stat. Ann., §26.32; Comp. Laws (1948) §554.32. *Case v. Green*, 78 Mich. 540, 44 N.W. 578 (1889); *Jeffers v. Sydnam*, 129 Mich. 440, 89 N.W. 42 (1902). *Chene v. Bank of Michigan*, Walk. Ch. 511 (Mich. 1844) may amount to a decision that a contingent remainder created in 1806 was destructible by the tenant in possession.

³⁹ 2 Mich. 294 (1852). The language of the will is quoted and another aspect of the case discussed in Part One *supra* at notes 258-259.

⁴⁰ Part Two, note 13 *supra*.

modern Rule Against Perpetuities as part of the common law of England; (2) The Rule Against Perpetuities was received in the completely developed form which it attained in England in 1833, not in the rudimentary form of some date prior to its complete evolution;⁴¹ (3) The modern Rule Against Perpetuities applies to legal contingent remainders;⁴² and (4) The so-called Old Rule Against Perpetuities, that a contingent remainder could not be limited to the child of an unborn life remainderman, was never received as law in Michigan.⁴³

The Michigan Revised Statutes of 1846,⁴⁴ which became effective March 1, 1847, contained a chapter (62) on estates in land taken from the New York Revised Statutes of 1829.⁴⁵ This chapter contained a number of provisions designed to prevent the creation of undesirable perpetuities by means of future freehold and leasehold interests in land.⁴⁶ The meaning and application of these provisions will be discussed in detail in Part Three of this work. For present purposes it is sufficient to note that the most important of them provided, in

⁴¹ Accord: PROPERTY RESTATEMENT, Div. IV, Part I, *Introductory Note*, p. 1441 (1944).

⁴² Accord as to indestructible contingent remainders: PROPERTY RESTATEMENT, §370, *Comment b* (1944); 2 Simes, LAW OF FUTURE INTERESTS, §505 (1936). Legal contingent remainders in Michigan land have been indestructible since 1838. Part Two, note 38 *supra*.

⁴³ Accord: PROPERTY RESTATEMENT, §370, *Comment q*. (1944); 2 Simes, LAW OF FUTURE INTERESTS, §487 (1936).

⁴⁴ As to the drafting of which see Part One at note 582 *supra*. Chapter 62 differs in several important respects from the equivalent New York provisions.

⁴⁵ As to the drafting of which see Part One at note 575 *supra*.

⁴⁶ Rev. Stat. 1846, c. 62, §§14, 15, 16, 17, 18, 19, 20, 23; Comp. Laws (1857) §§2598-2604, 2607; Comp. Laws (1871) §§4081-4087, 4090; Comp. Laws (1897) §§8796-8802, 8805; How. Stat. §§5530-5536, 5539; Comp. Laws (1915) §§11532-11538, 11541; Comp. Laws (1929) §§12934-12940, 12943; Mich. Stat. Ann., §§26.14-26.20, 26.23; Comp. Laws (1948) §§554.14-554.20, 554.23. Repealed by Act 38, P.A. 1949, §2; Mich. Stat. Ann., §26.49 (2); Comp. Laws (1948) §554.52.

effect, that every future estate should be void in its creation which should suspend the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate.⁴⁷ This statutory provision differed substantially in phraseology, theory, and application from the common-law Rule Against Perpetuities. The common-law Rule is phrased in terms of remoteness of vesting; it has no application to vested interests and does not prohibit suspension of the absolute power of alienation as such. The statutory provision, on the other hand, did not in terms prohibit remoteness of vesting.

It is evident that a limitation of a future interest might violate the statutory provision although it would not violate the common-law Rule.⁴⁸ Conversely, although the

⁴⁷ Rev. Stat. 1846, c. 62, §§14, 15, 16, note 46 *supra*. These sections read as follows:

"Sec. 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter: Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed.

"Sec. 15. The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section.

"Sec. 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age."

⁴⁸ Not only because the permissible period under the statute is shorter, but because some limitations which do not suspend vesting do suspend the absolute power of alienation. E.g. if Andrew Baker declared himself trustee of Blackacre to receive the rents and profits and apply them to the use of James Thorpe for life, then to the use of Lucy Baker for life, then to the use of John Stiles for life, then to the use of the children of John Stiles in fee, no part of the disposition would offend the common-law Rule Against Perpetuities because the three equitable life estates are presently vested, and the equitable contingent remainder to the children of John would necessarily vest, if at all, on the death of John, a life in being. The interests of both John and his children would, however, suspend the absolute power of

proposition is not so evident, a limitation which would violate the common-law Rule Against Perpetuities might not offend against the statute. If Andrew Baker conveyed land "to James Thorpe and his heirs so long as the Penobscot Building shall stand and then to John Stiles and his heirs," the executory interest of John Stiles would violate the common-law Rule because it might not vest within lives in being and 21 years, but it is arguable that it would not suspend the absolute power of alienation at all because James and John together might at any time convey an indefeasible estate in fee simple absolute.⁴⁹ Chapter 62 of the Revised Statutes of 1846 did not expressly abolish the common-law Rule Against Perpetuities, but it has been settled that its provisions superseded the common-law Rule as

alienation for longer than two lives in being because, under New York and Michigan law, neither the trustee nor the *cestui* of a trust for receipt of the rents and profits of land can alienate his interest. Part One *supra*, notes 592, 593.

⁴⁹ See: *Walker v. Marcellus and Otisco Lake Ry. Co.*, 226 N.Y. 347, 123 N.E. 736 (1919). At common law every unvested future interest suspended the absolute power of alienation because unvested future interests were inalienable. Part One, note 359 *supra*. As unvested legal future interests have been alienable in Michigan since 1838 (Part One, note 371 *supra*), they do not suspend the absolute power of alienation unless limited to unborn or unascertained persons. *Torpy v. Betts*, 123 Mich. 239, 81 N.W. 1094 (1900); *Russell v. Musson*, 240 Mich. 631, 216 N.W. 428 (1927); *Windiate v. Lorman*, 236 Mich. 531, 211 N.W. 62 (1926). See: *Fitzgerald v. City of Big Rapids*, 123 Mich. 281 at 283-4, 82 N.W. 56 (1900); *Michigan Trust Co. v. Baker*, 226 Mich. 72 at 77, 196 N.W. 976 (1924); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270 at 287, 255 N.W. 587 (1934); PROPERTY RESTATEMENT, c. B, §53. But see: *Toms v. Williams*, 41 Mich. 552 at 562, 2 N.W. 814 (1879); *State v. Holmes*, 115 Mich. 456, 73 N.W. 548 (1898). The limitation described in the text would, however, violate another provision of the New York Revised Statutes of 1829 (Part II, c. I, Tit. II, Art I, §24) that "a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Article." This provision which, like the common-law Rule Against Perpetuities, prohibits remoteness of vesting, was not adopted in Michigan.

to transactions regulated by the statutes, so that only the statutory provisions need be satisfied.⁵⁰

The New York Revised Statutes of 1829 extended the statutory provisions against perpetuities to all forms of property, real and personal.⁵¹ Chapter 62 of the Michigan Revised Statutes of 1846 applied only to interests in land, including freehold interests and chattels real. In consequence, after March 1, 1847, the validity of limitations of future interests in land was governed, so far as perpetuity problems were concerned, solely by the provisions of Chapter 62 whereas limitations of future interests in chattels personal and choses in action were, and still are, subject to the common-law Rule Against Perpetuities.⁵² When a single limitation of a future interest embraced both land and other property, regardless of the relative amounts of each, the limitation

⁵⁰ *Windiate v. Lorman*, 236 Mich. 531, 211 N.W. 62 (1926); *Rodey v. Stotz*, 280 Mich. 90, 273 N.W. 404 (1937). But see: *Michigan Trust Co. v. Baker*, 226 Mich. 72 at 76-77, 196 N.W. 976 (1924). Accord: PROPERTY RESTATEMENT, *App.*, c. B, §3. This problem cannot arise in New York because the courts there, in view of the statutory provision quoted in the preceding note, which was not adopted in Michigan, have held that the statutes prohibit suspension of vesting as well as suspension of the absolute power of alienation. *Matter of Wilcox*, 194 N.Y. 288, 87 N.E. 497 (1909); *Walker v. Marcellus and Otisco Lake Ry. Co.*, 226 N.Y. 347, 123 N.E. 736 (1919); PROPERTY RESTATEMENT, *App.*, c. A, §11. Hence any limitation which would offend the common-law Rule would also violate the New York statutes. Powell and Whiteside, *THE STATUTES OF THE STATE OF NEW YORK CONCERNING PERPETUITIES AND RELATED MATTERS* 73-75 [New York Legislative Document (1936) No. 65 (H)].

⁵¹ Part II, c. 4, Tit. IV, §§1, 2. There were some slight differences between the treatment of interests in land and that of other property.

⁵² *Toms v. Williams*, 41 Mich. 552 (1879); *Wilson v. Odell*, 58 Mich. 533, 25 N.W. 506 (1885); *Palms v. Palms*, 68 Mich. 355, 36 N.W. 419 (1888); *Penny v. Croul*, 76 Mich. 471, 43 N.W. 649 (1889); *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924); *Windiate v. Lorman*, 236 Mich. 531, 211 N.W. 62 (1926); *Rodey v. Stotz*, 280 Mich. 90, 273 N.W. 404 (1937); *Floyd v. Smith*, 303 Mich. 137, 5 N.W. (2d) 695 (1942). Accord: PROPERTY RESTATEMENT, *App.*, c. B, §5, 50. Cf. *Ledyard's Appeal*, 51 Mich. 623, 17 N.W. 208 (1883); *Hopkins v. Crossley*, 132 Mich. 612, 96 N.W. 499 (1903); *Moore v. O'Leary*, 180 Mich. 261, 146 N.W. 661 (1914).

failed unless it conformed to both the statutory provisions and the common-law Rule.⁵³

Because the Michigan statutes make both the estate of the trustee and the interest of the *cestui que trust* under a trust for the receipt of the rents and profits of land inalienable,⁵⁴ every future interest under such a trust suspends the absolute power of alienation.⁵⁵ In 1877 the Michigan Supreme Court suggested that a trust, as such, did not suspend the absolute power of alienation if, by its terms, the trustee had discretionary power to sell the land constituting the corpus.⁵⁶ This suggestion

⁵³ *State v. Holmes*, 115 Mich. 456, 73 N.W. 548 (1898); *Grand Rapids Trust Co. v. Herbst*, 220 Mich. 321, 190 N.W. 250 (1922); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934); *In re Richards' Estate*, 283 Mich. 485, 278 N.W. 657 (1938) (land valued at \$800; personalty at \$56,054); *De Buck v. Bousson*, 295 Mich. 164, 294 N.W. 135 (1940); PROPERTY RESTATEMENT, *App.*, c. B, ¶52. See: *Palms v. Palms*, 68 Mich. 355 at 370, 380, 36 N.W. 419 (1888); *Dodge v. Detroit Trust Co.*, 300 Mich. 575 at 598, 2 N.W. (2d) 509 (1942). *Cf.* *Toms v. Williams*, 41 Mich. 552 at 562, 2 N.W. 814 (1879); *Scheibner v. Scheibner*, 199 Mich. 630, 165 N.W. 660 (1917); *Rodey v. Stotz*, 280 Mich. 90 at 99, 273 N.W. 404 (1937).

⁵⁴ Rev. Stat. 1846, c. 63, §§19, 21; Comp. Laws (1857) §§2649, 2651; Comp. Laws (1871) §§4132, 4134; Comp. Laws (1897) §§8847, 8849; How. Stat., §§5581, 5583; Comp. Laws (1915) §§11583, 11585; Comp. Laws (1929) §§12985, 12987; Mich. Stat. Ann., §§26.69, 26.71; Comp. Laws (1948) §§555.19, 555.21; quoted in the text, Part One, *supra* at note 580.

⁵⁵ *Palms v. Palms*, 68 Mich. 355, 36 N.W. 419 (1888); *Foster v. Stevens*, 146 Mich. 131, 109 N.W. 265 (1906); *Otis v. Arntz*, 198 Mich. 196, 164 N.W. 498 (1917); *Scheibner v. Scheibner*, 199 Mich. 630, 165 N.W. 660 (1917); *Grand Rapids Trust Co. v. Herbst*, 220 Mich. 321, 190 N.W. 250 (1922); *Burke v. Central Trust Co.*, 258 Mich. 588, 242 N.W. 760 (1932); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934); *In re Richards' Estate*, 283 Mich. 485, 278 N.W. 657 (1938), Chapter 20, Section C, *infra*. *Cf.* *Methodist Episcopal Church of Newark v. Clark*, 41 Mich. 730, 3 N.W. 207 (1879). A present interest under such a trust also suspends the absolute power of alienation, but that is irrelevant to the question under discussion because the common-law Rule Against Perpetuities relates only to future interests.

⁵⁶ *Thatcher v. Wardens & Vestrymen of St. Andrew's Church of Ann Arbor*, 37 Mich. 264 (1877). See: *Methodist Episcopal Church of Newark v. Clark*, 41 Mich. 730 at 740, 3 N.W. 207 (1879); *Wilson v. Odell*, 58 Mich. 533, 25 N.W. 506 (1885); *Fitzgerald v. City of Big*

was questioned eleven years later ⁵⁷ and overruled in 1901 by a decision that a mere power of sale for reinvestment does not prevent a trust of land from suspending the absolute power of alienation.⁵⁸ It was settled by a number of decisions, however, that if the will or other instrument of trust *directed* the trustee to sell land constituting the corpus of the trust and reinvest in other types of property, the doctrine of equitable conversion applied and the trust would be treated as one of chattels personal, unaffected by the provisions of Chapter 62 of the Revised Statutes of 1846.⁵⁹ It follows that the validity of future interests under such a trust would be governed by the common-law Rule Against Perpetuities.⁶⁰

Rapids, 123 Mich. 281, 82 N.W. 56 (1900); PROPERTY RESTATEMENT, *App.*, c. B, ¶56, note 222. It does not follow that the validity of future interests under such a trust would be governed by the common-law Rule Against Perpetuities. The Thatcher case involved the validity of a vested legal remainder in fee simple following a trust which was to last for two lives and the time necessary to pay the second life *cestui's* expenses of last illness and burial. Records and Briefs, June Term 1877, No. 36.

⁵⁷ *Palms v. Palms*, 68 Mich. 355 at 386, 36 N.W. 419 (1888).

⁵⁸ *Niles v. Mason*, 126 Mich. 482, 85 N.W. 1100 (1901). Accord: *Grand Rapids Trust Co. v. Herbst*, 220 Mich. 321, 190 N.W. 250 (1922); *Allen v. Merrill*, 223 Mich. 467, 194 N.W. 131 (1923); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934); *In re Richards' Estate*, 283 Mich. 485, 278 N.W. 657 (1938); PROPERTY RESTATEMENT, *App.*, c. B, ¶56; Chapter 20, Section B (3), *infra*.

⁵⁹ *Penny v. Croul*, 76 Mich. 471, 43 N.W. 649 (1889); *Ford v. Ford*, 80 Mich. 42, 44 N.W. 1057 (1890) (direction to convert Michigan land into Missouri land exempted trust from the statutes); *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924) (devise to *A* for life, remainder to *B* as trustee to convert into money worked an equitable conversion on the death of *A*); *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N.W. 703 (1930); *Van Tyne v. Pratt*, 291 Mich. 626, 289 N.W. 275 (1939); *Floyd v. Smith*, 303 Mich. 137, 5 N.W. (2d) 695 (1942); PROPERTY RESTATEMENT, *App.*, c. B, ¶51; Chapter 20, Section B (3), *infra*. See: *Palms v. Palms*, 68 Mich. 355 at 380, 36 N.W. 419 (1888); *Dodge v. Detroit Trust Co.*, 300 Mich. 575 at 599, 2 N.W. (2d) 509 (1942). Cf. *Joseph v. Shaw*, 48 Mich. 355, 12 N.W. 486 (1882).

⁶⁰ *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924); *Floyd v. Smith*, 303 Mich. 137, 5 N.W. (2d) 695 (1942).

Act No. 38 of the Public Acts of 1949 repealed the provisions of Chapter 62 of the Revised Statutes of 1846 relating to perpetuities and suspension of the absolute power of alienation and declared:

"The common law rule known as the rule against perpetuities now in force in this state as to personal property shall hereafter be applicable to real property and estates and other interests therein, whether freehold or non-freehold, legal or equitable, by way of trust or otherwise, thereby making uniform the rule as to perpetuities applicable to real and personal property."⁶¹

This legislation makes it clear that limitations of future interests in conveyances or wills becoming effective on or after September 23, 1949, are subject to one, and only one, rule against perpetuities, the modern common-law Rule Against Perpetuities developed by the English courts between 1609 and 1833 and already in force in Michigan as to all limitations made prior to March 1, 1847. The statute also makes it clear that Michigan decisions relative to the application of the Rule Against Perpetuities to dispositions of interests in property other than land made between 1847 and 1949 are precedents for its application to limitations of interests in land made since 1949.

⁶¹ Sec. 1; Mich. Stat. Ann., §26.49 (1); Comp. Laws (1948) §554.51. Sec. 2 [Mich. Stat. Ann., §26.49 (2); Comp. Laws (1948) §554.52] repealed Rev. Stat. 1846, c. 62, §§14-20 and 23, Part Two, note 46 *supra*. Sec. 3 [Mich. Stat. Ann., §26.49 (3); Comp. Laws (1948) §554.53] provides: "This act applies only to wills with respect to which the testator dies after the effective date of this act and to deeds and other instruments executed after the effective date of this act." The act became effective September 23, 1949.

CHAPTER 10

The Period of the Rule

A. COMMENCEMENT OF THE PERIOD

THE RULE Against Perpetuities was developed to restrict the creation of remote future interests which were not destructible by the holder of the present interest. The Rule makes void any limitation of a future interest unless, at the moment when the interest becomes indestructible, it is certain that it must vest, if at all, within the period of the Rule.⁶² That period is, speaking generally, lives in being and twenty-one years. Ordinarily a future interest is indestructible from the time of its creation. Consequently the period of the Rule is normally computed from the time when the instrument creating the interest becomes effective. In the case of a deed, this is the time of delivery; in the case of a will, the death of the testator.⁶³ If John Stiles transfers prop-

⁶² Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §214 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §496 (1936); *PROPERTY RESTATEMENT*, §370, *Comment k.* (1944). The meaning of the requirement of certainty of vesting will be discussed in the next chapter.

⁶³ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §231 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §494 (1936); *PROPERTY RESTATEMENT*, §374, *Comment b.* (1944); *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934). A deed delivered in escrow does not operate as a conveyance until the occurrence of the condition of the escrow, but when that condition occurs its effectiveness dates back, for some purposes, to the time of the delivery in escrow. *Sheppard, TOUCHSTONE OF COMMON ASSURANCES* 58-59 (1648). See: *Butler and Baker's Case*, 3 Co. Rep. 25a at 35b, 76 Eng. Rep. 684 at 707 (1591). Cf. *Avery v. Consumers Power Co.*, 265 Mich. 696 at 700, 253 N.W. 189 (1934). The *Restatement of Property* takes no position as to the time from which the permissible period under the Rule Against Perpetuities is to be computed in the case of a deed delivered in escrow. §374, *Comment b, Caveat* (1944).

erty by deed to James Thorpe upon trust to pay the income to John for life, then to pay the income to John's youngest son for life, and then to transfer the property to the youngest grandson of John, the equitable contingent remainder of the grandson is void under the rule. John's youngest grandchild cannot be ascertained until the death of the last of John's children which, since John may have children after the delivery of the deed to James Thorpe, may not occur within lives in being and twenty-one years.⁶⁴ The same limitation would, however, be valid in a will, because all of John's children must necessarily come into being before the death of John, and the youngest of their children will certainly be ascertainable and in being before the death of the last of John's children.⁶⁵

Future interests limited to follow, or in defeasance of, an estate tail are destructible by the tenant in tail.⁶⁶ Because of this, the English courts held that contingent remainders on estates tail and executory interests limited in defeasance of estates tail need not comply with the Rule Against Perpetuities.⁶⁷ Andrew Baker could convey land to James Thorpe and the heirs of his body, remainder to the youngest descendant of John Stiles in being at the death of the last descendant of James. Likewise, Andrew Baker could convey land to James Thorpe

⁶⁴ 2 Simes, *LAW OF FUTURE INTERESTS*, §494 (1936).

⁶⁵ See: *Wilson v. Odell*, 58 Mich. 533, 25 N.W. 506 (1885).

⁶⁶ *Capel's Case*, 1 Co. Rep. 61b, 76 Eng. Rep. 134 (1593); *Benson v. Hodson*, 1 Mod. 108, 86 Eng. Rep. 768 (1674).

⁶⁷ *Nicholls v. Sheffield*, 2 Bro. C. C. 215, 20 Eng. Rep. 121 (1787); *Carr v. Earl of Erroll*, 6 East 58, 102 Eng. Rep. 1209 (1805); *Harrison v. Round*, 2 De G., M. & G. 190, 42 Eng. Rep. 844 (1852); *Portman v. Viscount Portman*, [1922] 2 A. C. 473 (H.L.); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§446-449 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §517 (1936); *PROPERTY RESTATEMENT*, §373, *Comment b.* (1944). It should be remembered that estates for years and other personalty could not be entailed.

and the heirs of his body, but if any tenant in tail fail to bear the name and arms of the grantor, then to John Stiles and his heirs. Michigan abolished estates tail in 1821,⁶⁸ but the principle that destructible future interests are not restricted by the Rule Against Perpetuities, although established by cases involving estates tail, is not limited to them.

It is clear from the cases involving estates tail that, if a future interest will be destructible at all times until it vests, the Rule Against Perpetuities has no application to it.⁶⁹ It would seem, moreover, that if a future interest is so limited as to be destructible for a time and then indestructible for a time before it vests, the Rule does apply to it, but the period of the Rule does not commence until the interest becomes indestructible.⁷⁰ In jurisdictions where estates tail are permitted, an interest which follows an interest limited on or in defeasance of an estate tail would fall into this category. Andrew Baker might convey land to James Thorpe and the heirs of his body, remainder to Lucy Baker and her heirs, but if Lucy dies unmarried, to the youngest descendant of John Stiles in being at the expiration of the estate tail. In such a case the final executory interest would be de-

⁶⁸ Act. Mar. 2, 1821, 1 Terr. Laws 815, Part One, note 82 *supra*; superseded by Rev. Stat. 1838, p. 258; superseded by Rev. Stat. 1846, c. 62, §§3, 4; Comp. Laws (1857) §§2587, 2588; Comp. Laws (1871) §§4070, 4071; Comp. Laws (1897) §§8785, 8786; How Stat., §§5519, 5520; Comp. Laws (1915) §§11521, 11522; Comp. Laws (1929) §§12923, 12924; Mich. Stat. Ann., §§26.3, 26.4; Comp. Laws (1948) §§554.3, 554.4; Part One, note 84 *supra*.

⁶⁹ Part Two, note 67 *supra*.

⁷⁰ PROPERTY RESTATEMENT, §373 (1944); 2 Simes, LAW OF FUTURE INTERESTS, §§516, 517 (1936). *Contra*: Gray, RULE AGAINST PERPETUITIES, 3rd ed., §446 (1915). Professor Gray appears to have thought that if, in the absence of destructibility, the future interest would be void under the Rule, destructibility would not save it unless it was certain to vest at or before the termination of the period of destructibility. No Michigan authority on the point has been found.

structible during the continuance of the estate tail but indestructible thereafter during the life of Lucy. In all jurisdictions, including Michigan, a future interest may be destructible because of the existence of an unlimited power of appointment or of revocation.⁷¹ Andrew Baker might transfer property by deed to John Stiles for life, remainder to the youngest son of John Stiles for life, remainder as John may by will or deed appoint and, in default of appointment, to the youngest grandson of John. John Stiles might transfer property by deed to James Thorpe upon trust to pay the income to John for life, then to pay the income to the youngest son of John for life, then to transfer the property to the youngest grandson of John, reserving to the settlor an unlimited power to revoke the trust.⁷² In each of these examples, in the absence of the power, the period of the Rule Against Perpetuities would commence with the delivery of the deed and the ultimate remainder to the youngest grandson of John Stiles would, accordingly, be void. In each example, however, the presence of the power enables John Stiles to destroy the ultimate remainder during his lifetime. This being so, it would seem that the period of the Rule Against Perpetuities

⁷¹ A power unlimited as to objects is ordinarily referred to as a general power. However, as the Michigan statutes confine the term "general power" over land to powers to appoint the full fee, it is best to avoid use of the term "general power" in Michigan when considering the question under discussion. Rev. Stat. 1846, c. 64, §6; Comp. Laws (1857) §2663; Comp. Laws (1871) §4146; Comp. Laws (1897) §8861; How. Stat., §5595; Comp. Laws (1915) §11597; Comp. Laws (1929) §13000; Mich. Stat. Ann., §26.96; Comp. Laws (1948) §556.6.

⁷² A similar type of destructibility would exist if John Stiles insured his life and designated James Thorpe as beneficiary of the policy, upon the trusts described in the text, reserving power to change the designation of beneficiary. PROPERTY RESTATEMENT, §373, *Comment e.* (1944); Smith, PERSONAL LIFE INSURANCE TRUSTS, §34.2 (1950).

should be calculated from the death of John Stiles, in which case the ultimate remainder to the youngest grandson of John would be valid.⁷³

It would seem that a future interest is destructible for purposes of the Rule Against Perpetuities only while some living person has unlimited and unconditional power to vest it in himself for his own exclusive benefit.⁷⁴ In jurisdictions where estates tail still exist with the incidents they had in seventeenth-century England, a tenant in tail has such power over the future interests limited to follow, or in defeasance of, the estate tail. The holder of such an unlimited power of appointment or of revocation as those involved in the examples in the preceding paragraph does also. But a future interest is not destructible for the purpose under discussion merely because some living person may defeat it by the exercise of a power of appointment if the power may be exercised only by will,⁷⁵ if it may be exercised only

⁷³ PROPERTY RESTATEMENT, §373, *Comment c.* (1944); 2 Simes, LAW OF FUTURE INTERESTS, §516 (1936). Another possible situation is that of a future interest which is so limited as to be indestructible for a period, then destructible for a period, then indestructible again for a period before it vests. Andrew Baker might transfer property by deed to John Stiles for life, remainder to the youngest son of John Stiles for life, remainder as the youngest son of John may, by deed or will becoming effective within twenty years after the death of John, appoint and, in default of appointment, to the youngest grandchild of John. In such a case the *Restatement* takes the position that the period of the Rule Against Perpetuities is to be computed from the end of the period of destructibility, i.e., twenty years after the death of John or upon the earlier death of John's youngest son. §373, *Comment d.* (1944).

⁷⁴ PROPERTY RESTATEMENT, §373, *Comment d.* (1944). Professor Simes thinks that it is sufficient if a group of cotenants have jointly, as co-owners, such a power, 2 LAW OF FUTURE INTERESTS, §515 (1936).

⁷⁵ PROPERTY RESTATEMENT, §373, *Comment d.* (1944). Cf. 2 Simes, LAW OF FUTURE INTERESTS, §§516, 538 (1936); 3 Walsh, COMMENTARIES ON THE LAW OF REAL PROPERTY, §340 (1947). But Rev. Stat. 1846, c. 64, §12, Comp. Laws (1857) §2669, Comp. Laws (1871) §4152, Comp. Laws (1897) §8867, How. Stat., §5601, Comp. Laws (1915) §11603, Comp. Laws (1929) §13006, Mich. Stat. Ann., §26.102, Comp. Laws

upon performance of a condition precedent, such as the payment of money,⁷⁶ or if the exercise of the power is restricted to objects other than the holder of the power.⁷⁷ If Andrew Baker transfers property to John Stiles for life, remainder to the youngest son of John for life, remainder as John may by will appoint and, in default of appointment, to the youngest grandson of John, the ultimate remainder is void under the Rule Against Perpetuities. If Andrew Baker transfers property to John Stiles for life, remainder to the youngest son of John for life, remainder as John may by will or deed appoint after paying \$1,000 to St. Paul's Cathedral and, in default of appointment, to the youngest grandson of John, the ultimate remainder is likewise void. The same is true if Andrew Baker transfers property to John Stiles for life, remainder to the youngest son of John for life, remainder to such descendant of John as John may appoint and, in default of appointment, to the youngest grandson of John.

A future interest is not destructible for this purpose

(1948) §556.12, provides: "When a general and beneficial power to devise the inheritance, shall be given to a tenant for life or years, such tenant shall be deemed to possess an absolute power of disposition, within the meaning, and subject to the provisions of the last three preceding sections." It would seem that future interests subject to such a power are destructible for purposes of the Rule Against Perpetuities. See Part Two, notes 293, 304, 305, 321 *infra*.

⁷⁶ PROPERTY RESTATEMENT, §373, *Comment e.* (1944); 2 Simes, LAW OF FUTURE INTERESTS, §518 (1936). An option to purchase would be such a power. In *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924) a testatrix devised land to her husband until his death or remarriage, "with right to spend the income and so much of the principal as he might desire for his support and comfort, and with power to sell and give conveyance," remainder to a trustee to convert into personalty and hold on trust for successive beneficiaries. The Court held that the period of the Rule Against Perpetuities commenced at the death of the testatrix rather than at the death of the husband.

⁷⁷ PROPERTY RESTATEMENT, §373, *Comment d.* (1944); 2 Simes, LAW OF FUTURE INTERESTS, §516 (1936).

merely because its owner is in being and ascertained and so can release or convey it. If Andrew Baker conveys land "to James Thorpe and his heirs so long as the Penobscot Building shall stand and then to John Stiles and his heirs," the executory interest of John Stiles is void under the Rule although John could at any time release it to James Thorpe or unite with James to convey an absolute fee simple.⁷⁸ Neither is a future interest destructible for this purpose merely because some living person has power to sell the property involved free of the future interest if the proceeds of the sale will be subject to the future interest. A trustee can defeat future interests in the trust property by selling it wrongfully to a bona fide purchaser or by selling it rightfully for reinvestment purposes under a power conferred by the trust instrument or an order of a court of equity, but he cannot do so for his own exclusive benefit because the proceeds of such a sale are subject to the future interest in trust.⁷⁹ Statutes of many jurisdictions, including Michigan,⁸⁰ authorize sale of property in which future interests exist, free of such interests, on petition

⁷⁸ *Grey v. Montagu*, 2 Eden 205, 28 Eng. Rep. 876 (1764); *aff'd.*, 3 Brown 314, 1 Eng. Rep. 1341 (H.L.1770); *In re Johnson's Trusts*, L.R. 2 Eq. 716 (1866); *In re Hargreaves*, 43 Ch. Div. 401 (C.A. 1890); PROPERTY RESTATEMENT, §373, *Comment e.* (1944); 2 Simes, LAW OF FUTURE INTERESTS, §514 (1936); 3 Walsh, COMMENTARIES ON THE LAW OF REAL PROPERTY, §§336 (1947). *Contra*: *Avern v. Lloyd*, L.R. 5 Eq. 383 (1868) (overruled by *In re Hargreaves*, *supra*).

⁷⁹ 2 Simes, LAW OF FUTURE INTERESTS, §518 (1936); *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924); *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N.W. 703 (1930); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934).

⁸⁰ Act 314, P.A. 1915, c. 19, §§62 to 70; Comp. Laws (1915) §§12716 to 12724; Comp. Laws (1929) §§14404 to 14412; Mich. Stat. Ann., §§27.1188 to 27.1196; Comp. Laws (1948) §§619.62 to 619.70. This is a reenactment of Act 233, P.A. 1887, as amended, Comp. Laws (1897) §§9234 to 9242. See: PROPERTY RESTATEMENT, §124, *Comment i.*; §179, note (1936); *Garrison v. Hecker*, 128 Mich. 539, 87 N.W. 642 (1901); *Young v. Young*, 255 Mich. 173, 237 N.W. 535, 77 A.L.R. 963 (1931).

of the owner of the present interest and judicial order. But such statutes provide that the proceeds of the sale shall be subject to the future interests, so the owner of the present interest does not have unlimited and unconditional power to destroy the future interest for his own exclusive benefit.⁸¹

The application of the Rule Against Perpetuities to future interests which are subject to destruction by the exercise of a power of appointment has been touched upon. The Rule also applies to powers of appointment themselves and to future interests created by their exercise. In the application of the Rule to future interests created by the exercise of a power of appointment, the period of the Rule is in some cases computed from the effective date of the instrument creating the power and in others from the effective date of the instrument exercising the power.⁸² The commencement of the period of the Rule Against Perpetuities in cases involving future interests created by the exercise of a power of appointment will be discussed in a later chapter in connection with the application of the Rule to such powers themselves.⁸³

B. COMPUTATION OF THE PERIOD

In *St. Amour v. Rivard*⁸⁴ the Supreme Court of Michigan held that an attempt to create a "perpetual free-

⁸¹ 2 Simes, LAW OF FUTURE INTERESTS, §519 (1936). Cf. *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924).

⁸² PROPERTY RESTATEMENT, §§390-392 (1944); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §§514, 524 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §§534-539 (1936); 3 Walsh, COMMENTARIES ON THE LAW OF REAL PROPERTY, §§340, 349 (1947). See: *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270 at 285, 255 N.W. 587 (1934).

⁸³ Chapter 13, Section C, *infra*.

⁸⁴ 2 Mich. 294 (1852), discussed above at Part One, notes 258-259 and Part Two, note 39. Cf. *Brush v. Beecher*, 110 Mich. 597, 68 N.W. 420, 64 Am. St. Rep. 373 (1896), indicating that an endless series of five-year terms, each limited on a condition precedent, would be void.

hold" or endless series of life estates in successive generations was void because it violated the common-law Rule Against Perpetuities. With respect to the period of the Rule, the Court said:

"At first it was held that the contingency upon which the estate was to vest must happen within the compass of a life or lives in being, or a reasonable number of years; afterwards it was further extended to a child *en ventre sa mere*, at the time of the death of the father; subsequently it was extended to twenty-one years after the death of a person in being. * * * The period of limitation as now recognized is that laid down by Lord Kenyon, in *Long v. Blackall*,⁸⁵ 7 T.R., 102, and is stated in these words: 'It is an established rule that an executory devise is good if it must necessarily happen within a life or lives in being, and twenty-one years and the fraction of another year, allowing for the time of gestation.' In an opinion distinguished for its learning and careful research, delivered by the Judges of England upon questions submitted to them by the House of Lords, in 1833, it was considered that twenty-one years was the limit, and that the period of gestation was to be allowed in those cases only in which gestation existed. *Cadell v. Palmer*,⁸⁶ 10 Bing., 140."⁸⁷

*Gardner v. City National Bank & Trust Co.*⁸⁸ was a suit to construe a will which created two trusts. The income from each trust was to be paid to a named daughter of the testator for life. On the death of each life beneficiary, the corpus of the trust was to be divided into equal parts, one for each of her children. Each child was

⁸⁵ 101 Eng. Rep. 875 at 877 (1797).

⁸⁶ 131 Eng. Rep. 859, 1 Cl. & F. 372, 6 Eng. Rep. 956 (1833).

⁸⁷ 2 Mich. 294 at 297.

⁸⁸ 267 Mich. 270, 255 N.W. 587 (1934). As the testator died in 1931 and the trusts included both land and other property, compliance with both the statute prohibiting the suspension of the absolute power of alienation and the common-law Rule Against Perpetuities was required. Part Two, note 53 *supra*.

to receive the income from his part until twenty-five, then half the corpus, the income from the other half until thirty, and then the balance of the corpus. If any child died under thirty leaving issue, his share was to pass to his issue, subject to trust during minority. If any child died under thirty without surviving issue, his share was to pass to the trusts for the surviving children of the life beneficiary or, if there were none, to the trust for the other daughter of the testator. As the testator's daughters might have children after his death and the takers of the ultimate remainders could not be ascertained until the youngest of their children reached the age of thirty, the vesting of these remainders might not occur for lives in being (those of the two daughters) and thirty years. The Court accordingly held that they violated the common-law Rule Against Perpetuities, quoting the following from Halsbury's *Laws of England* as to the period of the Rule:

“ ‘The rule stated more fully is as follows:

“ ‘First, subject to the exceptions hereafter mentioned every future estate or interest in any kind of property, the rights in which are governed by the law of England, must be such that, at the time when the instrument creating it comes into operation, it can be predicated that, if the estate or interest vests at all, it must necessarily vest not later than at the end of a certain period.

“ ‘Secondly, this period is the life of a person or the survivor of any number of persons in being at the time of creation of such future estate or interest, and ascertained for that purpose by the instrument creating the same, and 21 years to be computed from the dropping of such life; but if no such person or persons are ascertained by the instrument, the period is 21 years computed from the time of creation of the future estate or interest.

“ ‘In the following paragraphs this period is called “the perpetuity period.”

“ ‘Thirdly, a child who is *en ventre sa mère* at the time of creation of an estate or interest, and is afterwards born alive, is deemed to be a person in being for the purposes both of the vesting of the estate or interest in him, and of being a life chosen to form the perpetuity period. The perpetuity period may, therefore, be apparently extended by a period or periods for gestation, but only in those cases where gestation actually exists. This branch of the rule is applied whether it is for the advantage of the unborn child or not. * * *

“ ‘Fifthly, any estate or interest which does not necessarily satisfy the above rule is void from its creation, and events, subsequent to the date of the instrument which, or subsequent to the death of the testator whose will, created the estate or interest, which in fact make the vesting take place within the perpetuity period, have no effect so as to make the estate or interest valid.’ ” ⁸⁹

As the passage quoted by our Supreme Court from Halsbury's *Laws of England* indicates, the measuring lives in being must be those of persons “ascertained for that purpose by the instrument creating” the future interest. This does not mean either that the persons whose lives are to be used as a measure must be named in the instrument or that the instrument must manifest an intention that the lives of particular persons should be used for that purpose; it means only that it must appear from the instrument that the future interest thereby limited must vest, if at all, within twenty-one years after ascertainable lives.⁹⁰ Thus if John Stiles devises property to James Thorpe and his heirs “until my youngest grand-

⁸⁹ 267 Mich. 270 at 284-285, quoting from 22 Halsbury, *LAW OF ENGLAND*, §641, p. 302 (1912).

⁹⁰ *PROPERTY RESTATEMENT*, §374, *Comment j.* (1944); 2 Simes, *LAW OF FUTURE INTERESTS*, §491 (1936).

son reaches twenty-one and then to such grandson and his heirs," the measuring lives are those of John's children, although they are not mentioned in the instrument and John may never have heard of the Rule Against Perpetuities. Even if the grantor or testator expressly manifests an intention to suspend vesting for a period in excess of that permitted by the Rule, a future interest is valid if it must vest within the permissible period. If John Stiles devises property to James Thorpe upon trust to pay the income to John's children during their lives, then to pay the income to John's grandchildren until the youngest reaches twenty-five, then to transfer the property to the youngest grandson, "it being my intention to suspend the vesting of the ultimate remainder until twenty-five years after the death of the survivor of my children," the ultimate remainder will be valid if all of John's children predecease him because, in that event, the measuring lives in being will be those of John's grandchildren.⁹¹

The measuring lives in being must be those of human beings; lives of animals, regardless of their life expectancies,⁹² or of corporations⁹³ will not do. Although the measuring lives are usually those of persons who take something under the instrument creating the future interest or their ancestors, and all of the reported Michigan cases involve measurement by the lives of such persons,

⁹¹ PROPERTY RESTATEMENT, §374, *Comment k.* (1944); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §231 (1915).

⁹² In re Estate of Kelly, [1932] I.R. 255; Gray, RULE AGAINST PERPETUITIES, 3rd ed., §§228a, 906 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §491 (1936); PROPERTY RESTATEMENT, §374, *Comment h.* (1944). See: Matter of Howells, 145 Misc. 557, 260 N.Y. Supp. 598 (1932); Clark, "Unenforcible Trusts and the Rule Against Perpetuities," 10 MICH L. REV. 31 at 40 (1911). Cf. In re Dean, 41 Ch. D. 552 (1889).

⁹³ Fitchie v. Brown, 211 U.S. 321 (1908); PROPERTY RESTATEMENT, §374, *Comment h.* (1944); 2 Simes, LAW OF FUTURE INTERESTS, §491 (1936).

the instrument may by apt language designate as measuring lives those of persons who take nothing under it and are not related to persons who do.⁹⁴ John Stiles may devise property to James Thorpe and his heirs "until the death of the survivor of the present members of the Supreme Court of Michigan and then to my youngest male descendant living at the time of such death." Although there is no definite limit to the number of measuring lives in being which is permissible, they must be the lives of persons who are not so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.⁹⁵ John Stiles may devise property

⁹⁴ *In re Villar*, [1928] Ch. 471, *aff'd.*, [1929] 1 Ch. 243 (C.A.); PROPERTY RESTATEMENT, §374, *Comment l.* (1944); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §216 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §491 (1936).

⁹⁵ *Thellusson v. Woodford*, 11 Ves. Jr. 112, 32 Eng. Rep. 1030 (H.L. 1805). In his opinion in this case, the Lord Chancellor (Lord Eldon) made the classic statement of the rule: "The language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine, when the survivor of them drops." 11 Ves. Jr. at 146, 32 Eng. Rep. at 1043. Gray, RULE AGAINST PERPETUITIES, 3rd ed., §216 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §491 (1936). In *Cadell v. Palmer*, 1 Cl. & F. 372, 6 Eng. Rep. 956 (1833), twenty-eight lives, and in *Fitchie v. Brown*, 211 U.S. 321 (1908), forty-odd lives, were held not too numerous, but in *In re Moore*, [1901] 1 Ch. 936, measurement by the lives of "all persons who shall be living at my death" was held to be too indefinite. In *re Villar*, [1928] Ch. 471, *aff'd.*, [1929] 1 Ch. 243 (C.A.), involved measurement by the lives of the descendants of Queen Victoria living in 1926, of whom there were some 120. It was held valid. Accord: *In re Khoo Cheng Teow*, [1932] Straits Settlements L.R. 226; *In re Leverhulme*, [1943] 2 All Eng. L.R. 274, 169 L.T. 294. PROPERTY RESTATEMENT, §374, *Comment l.* (1944) takes the position that the lives of the descendants of Queen Victoria living in 1941 would be too numerous. Cf. *In re Leverhulme*, [1943] 2 All Eng. L.R. 274 at 280-281, 169 L.T. 294 at 298. As the *Restatement* points out, the obscurity of the persons whose lives are involved has a bearing on the difficulty of proving their deaths. It is interesting to note that the future interests involved in *Cadell v. Palmer*, *supra*, created by the will of a testator who died in 1818, did not vest until 1918. [1928] Ch. 478, note. In *Hay v. Hay*, 317 Mich. 370, 26 N.W. (2d) 908 (1947), personalty was bequeathed to a trustee to pay certain annuities and accumulate the rest of the income "for 21 years after the death of

to James Thorpe and his heirs "until the death of the survivor of my fourteen law partners and then to my youngest male descendant living at the time of such death." But the executory interest of John's youngest living male descendant would be void if he is to be ascertained on the death of the survivor of "the persons listed in the Lansing City Directory on January 1, 1954" or "those persons who crossed the Ambassador Bridge from Detroit to Canada on July 4, 1954," because these groups are too large and, in the case of the last example, too difficult to identify, to make proof of the deaths included reasonably convenient.

The Rule Against Perpetuities permits suspension of vesting until the expiration of a life or lives in being. In *Palms v. Palms*⁹⁶ property was bequeathed to trustees to pay half the income to the testator's son and half to his daughter for life. On the death of either, half the principal was to be paid to the children of the deceased child, if any. If the child who first died had no surviving issue, the entire income was to be paid to the surviving child for life and, on his death, the principal was to go to his children. As all interests would necessarily vest on the

my last surviving grandchild that shall be living at the time of my death," then to distribute the accumulated fund to the testator's heirs to be determined at that time. There were seven grandchildren living when the testator died. The bequest was treated as valid.

⁹⁶ 68 Mich. 355, 36 N.W. 419 (1888). This case involved a disposition which included both land and personalty and so was subject to the common-law Rule Against Perpetuities. Part Two, note 53 *supra*. In *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924), a silver tea set was bequeathed to the testatrix's husband for life. The will further provided, "The Baker silver tea set shall go to my son Stuart for his use only for his life, at his death it is to go to his child or children, if any, if none, to his brother Looe, if living, if not to his child or children, if any, and if none, to the said Marie Grampp." If Marie and her children were dead on the death of Stuart, the set was to go to two other named persons. These provisions were held valid because vesting was not postponed beyond the lives of the husband and Stuart.

death of the surviving child, it was held that the limitations did not violate the Rule Against Perpetuities. In *McLain v. Howald*⁹⁷ a bequest to grandchildren of the testator to be ascertained on the death or remarriage of his wife was held valid. In *Floyd v. Smith*⁹⁸ property was bequeathed to a trustee to pay the income to four named children of the testator's sister and their issue until the death of the survivor of the four, and then to transfer the principal to the issue of the four living at the time of such death. A codicil transferred the interest of one of the four to his children. The Court held that the codicil was not intended to change the measuring lives, which were those of the four children of the sister and that, as the interests would all vest on the death of the survivor of these four, they were valid under the Rule.

The Rule Against Perpetuities permits suspension of vesting for part or parts of a life or lives in being at the commencement of the period. Thus in *Walton v. Torrey*⁹⁹ a devise to descendants of the testator to be ascertained when the youngest of his children reached twenty-one was treated as valid. So, likewise, in *In re Dingler's*

⁹⁷ 120 Mich. 274, 79 N.W. 182, 77 Am. St. Rep. 597 (1899). In *Cheever v. Washtenaw Circuit Judge*, 45 Mich. 6, 7 N.W. 186 (1880), a bequest to a daughter for life, remainder to her children and grandchildren, was treated as valid, it being construed to be to children and grandchildren in being at the death of the daughter.

⁹⁸ 303 Mich. 137, 5 N.W. (2d) 695 (1942). Both land and personalty were involved but, as the will contained a mandatory direction for conversion of land into personalty, the common-law Rule Against Perpetuities was alone applicable. Part Two, notes 59, 60 *supra*.

⁹⁹ Harr. Ch. 259 (Mich. circa 1840). The limitation was of land, but, as the testator died in 1825, its validity was governed by the common-law Rule Against Perpetuities. Similarly, in *Toms v. Williams*, 41 Mich. 552, 2 N.W. 814 (1879) the vesting of property bequeathed by a will was validly suspended until "the expiration of the minority of the youngest of the said children of my deceased brother, Gen. Thomas Williams." There were three such children, one of whom was of age when the testatrix died.

*Estate*¹⁰⁰ a bequest to descendants of the testatrix to be ascertained when two granddaughters, who were named in the will and alive when it took effect, reached the age of thirty, was held good. The Rule also permits suspension of vesting for lives in being at the commencement of the period plus part or parts of a life or lives not then in being which cannot exceed twenty-one years. Thus in *Wilson v. Odell*,¹⁰¹ a bequest to grandchildren of the testator to be determined after the death of the survivor of his children and on the majority of his youngest grandchild was held valid under the Rule.

The Rule Against Perpetuities does not permit suspension of vesting for lives in being plus part or parts of a life or lives not in being which may exceed twenty-one years. This is one of the commonest types of violation of the Rule. In *Michigan Trust Co. v. Baker*,¹⁰² testatrix devised land to her husband until death or remarriage, then to a trustee to sell the land and hold the proceeds in trust to pay half the income to a son, Stuart, for life. The will, as construed by the Court, gave the remainder in half the corpus, after the death of Stuart, to those daughters of Stuart who reached twenty-five and those sons of Stuart who reached thirty. It was held that this

¹⁰⁰ 319 Mich. 189, 29 N.W. (2d) 108 (1947). The disposition was in a residuary clause which included both land and personalty and so was subject to the common-law Rule Against Perpetuities. Part Two, note 53 *supra*. In *Post v. Grand Rapids Trust Co.*, 255 Mich. 436, 238 N.W. 206 (1931), a bequest of personalty to issue of a daughter to be determined when the youngest issue of the daughter in being at the death of the testatrix reached twenty-five was treated as valid.

¹⁰¹ 58 Mich. 533, 25 N.W. 506 (1885).

¹⁰² 226 Mich. 72, 196 N.W. 976 (1924). This was a devise of land, but the will contained a mandatory direction to convert into money upon the death or remarriage of the testatrix's husband. It was held that this direction worked an equitable conversion to personalty, effective upon the death of the husband, so that the common-law Rule Against Perpetuities governed the validity of the subsequent limitations. See Part Two, notes 59, 60 *supra*.

disposition violated the Rule because Stuart might have children who would not reach the stipulated ages within twenty-one years after his death. In *Gettins v. Grand Rapids Trust Co.*,¹⁰³ property was bequeathed to a trustee to pay the income to the testatrix's daughter Belle for life and thereafter to her children, and to transfer a share in the corpus to each child of Belle on reaching twenty-five, with limitations over in the event of any child dying under twenty-five. The limitations over on death under twenty-five were held void because they might postpone vesting until more than twenty-one years after Belle's death. *Gardner v. City National Bank & Trust Co.*,¹⁰⁴ which has already been discussed, involved the same type of violation of the Rule Against Perpetuities.

As the English authorities quoted by our Supreme Court indicate,¹⁰⁵ the period of the Rule Against Perpetuities may include any period or periods of gestation involved in the situation to which the limitation applies. That is, a child *en ventre sa mère* who is subsequently born alive is treated as a life in being under the Rule,

¹⁰³ 249 Mich. 238, 228 N.W. 703 (1930). The will contained a mandatory direction to convert land into personalty. The same result was reached on similar facts in *Burke v. Central Trust Co.*, 258 Mich. 588, 242 N.W. 760 (1932). Because the trust there included both land and personalty and there was no direction to convert, the Court based its decision on the statute forbidding suspension of the absolute power of alienation, saying that it was unnecessary to consider the application of the common-law Rule Against Perpetuities.

¹⁰⁴ 267 Mich. 270, 255 N.W. 587 (1934), discussed above at Part Two, note 88. This aspect of the Rule has been modified in England by Stat. 15 Geo. V, c. 20, §163 (1925), which provides that any gift contingent upon a beneficiary or class of beneficiaries attaining or not attaining an age over twenty-one, and for that reason too remote, is to take effect by substituting twenty-one for the age stated.

¹⁰⁵ *St. Amour v. Rivard*, 2 Mich. 294 at 297 (1852), quoting from *Long v. Blackall*, 7 T.R. 102, 101 Eng. Rep. 875 at 877 (1797), quoted in the text at Part Two, note 87 *supra*; *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270 at 284, 255 N.W. 587 (1934), quoting from 22 Halsbury, *LAW OF ENGLAND*, §601 p. 302 (1912), quoted in the text at Part Two, note 89 *supra*.

both for the purpose of receiving interests limited to it and for that of serving as a measuring life in being as to interests limited to others. In *Chambers v. Shaw*,¹⁰⁶ a testator devised his estate to his wife for life with a provision that if a posthumous child should be born it would take half the estate, to commence in possession when it reached twenty-one, and that the wife would take the other half if she lived until the child was twenty-one, otherwise the child would take the whole. The testator died in September, 1860, a son was born in December, 1860, the son died in April, 1862, and the wife died in September, 1862. The Court held that the wife took the entire estate as sole heir of her son, saying that the first interest to the posthumous son vested on the testator's death. This case illustrates both the purposes mentioned. The posthumous son was treated as a life in being for the purpose of the vesting of the half given him unconditionally and as a measuring life for the purpose of the vesting of the other half. It is permissible under the Rule to suspend vesting for any number of periods of gestation actually involved in addition to lives in being and twenty-one years. It is possible to have as many as three such periods.¹⁰⁷ John Stiles might

¹⁰⁶ 52 Mich. 18, 17 N.W. 223 (1883). The will contained a mandatory direction to convert the land into personalty so the common-law Rule Against Perpetuities applied. Rev. Stat. 1846, c. 62, §§30, 31; Comp. Laws (1857) §§2614, 2615; Comp. Laws (1871) §§4097, 4098; Comp. Laws (1897) §§8812, 8813; How. Stat., §§5546, 5547; Comp. Laws (1915) §§11548, 11549; Comp. Laws (1929) §§12950, 12951; Mich. Stat. Ann., §§26.30, 26.31; Comp. Laws (1948) §§554.30, 554.31, provide: "When a future estate shall be limited to heirs, or issue, or children, posthumous children shall be entitled to take, in the same manner as if born before the death of their parents."

"A future estate depending on the contingency of the death of any person without heirs or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent."

¹⁰⁷ Gray, RULE AGAINST PERPETUITIES, 3rd ed., §222 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §492 (1936); PROPERTY RESTATEMENT, §374, Comment *p.* (1944).

devise property to James Thorpe and his heirs "until my youngest grandchild is of age and then to my youngest descendant in being." If John has a posthumous child which has a posthumous son who is the father of a *child en ventre sa mère* when he comes of age, the unborn child could take the executory interest limited to the youngest descendant of John in being. Periods of gestation are allowed under the Rule Against Perpetuities only if gestation in fact exists; it is not permissible to suspend vesting for lives in being plus twenty-one years and nine months in gross.¹⁰⁸ If John Stiles devises property to James Thorpe and his heirs "until twenty-one years and nine months after the death of my youngest child and then to my youngest descendant in being," the executory limitation is void although it must necessarily vest within a period which might well be shorter than that involved in the preceding illustration.

As the passage quoted by our Supreme Court from Halsbury's *Laws of England*¹⁰⁹ indicates, the period of the Rule Against Perpetuities is the life of a person or the survivor of a group of persons in being and ascertained for that purpose by the instrument creating the future interest in question and twenty-one years, but if no such person or persons are ascertained by the instrument, the period is twenty-one years. Whether the term of years follows lives in being or is itself the sole measure of the period, it may be in terms of a minority or minorities, as was the case in *Wilson v.*

¹⁰⁸ *Cadell v. Palmer*, 1 Cl. & F. 372, 6 Eng. Rep. 956 (1833), cited with approval in *St. Amour v. Rivard*, 2 Mich. 294 at 297 (1852). See: *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270 at 284, 255 N.W. 587 (1934) and authorities cited in the preceding note.

¹⁰⁹ *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270 at 284, 255 N.W. 587 (1934), quoting from 22 Halsbury, *LAW OF ENGLAND*, §601, p. 302 (1912), quoted in the text at Part Two, note 89 *supra*.

Odell,¹¹⁰ or a gross period of twenty-one years or less unrelated to minorities.¹¹¹ *Toms v. Williams*¹¹² was a suit to construe the will of a testatrix who died in 1876 owning the reversion under a forty-year lease given in 1854 which required the lessor, at the expiration of the term in 1894, to pay for the lessee's improvements (a building costing some \$50,000) or renew the lease for another forty years. The will gave the entire estate, including personalty, to trustees who were to accumulate \$5,000 per year of the income, use it to pay for the lessee's improvements in 1894, and then to transfer the corpus of the trust to three named persons "or the survivor of them, and to their heirs and assigns forever, as tenants in common." The Court held that the provision for accumulation for eighteen years did not exceed the period of the common-law Rule Against Perpetuities, which the Court said was "any number of lives in being and twenty-one years, and of course for twenty-one years as a distinct period, independent of lives."¹¹³ In *Markham v. Hufford*,¹¹⁴ testatrix bequeathed \$500 to the petitioner "to be paid to him at the expiration of two years from the date of my demise: *Provided* that he shall be deemed a reformed man, in the judgment of the executors of this will," otherwise to the Women's Chris-

¹¹⁰ 58 Mich. 533, 25 N.W. 506 (1885), Part Two, note 101 *supra*.

¹¹¹ *Cadell v. Palmer*, 1 Cl. & F. 372, 6 Eng. Rep. 956 (1833), cited with approval in *St. Amour v. Rivard*, 2 Mich. 294 at 297 (1852) and *Toms v. Williams*, 41 Mich. 552 at 571, 2 N.W. 814 (1879); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §223 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §493 (1936); *PROPERTY RESTATEMENT*, §374, *Comment m.* (1944).

¹¹² 41 Mich. 552, 2 N.W. 814 (1879). The surplus income above \$5,000 per annum was to be accumulated until the expiration of the minority of the youngest of the three named persons and then paid over to them or the survivor of them. One of them was of age when the testatrix died.

¹¹³ 41 Mich. 552 at 571.

¹¹⁴ 123 Mich. 505, 82 N.W. 222, 48 L.R.A. 580 (1900).

tian Temperance Union. It was held that this was a condition precedent which suspended vesting for only two years in gross and so was valid. *In re De Bancourt's Estate*¹¹⁵ involved a bequest to a trustee to pay the income to the testator's heirs for fifteen years and then to transfer the corpus to the heirs of the testator determined according to the statute then in force. It was treated as valid.

It will be recalled that if lives in being are to be used as all or part of the measure of the period of the Rule Against Perpetuities, they must be the lives of persons ascertained for that purpose by the instrument creating the future interest; courts will not select lives not designated by the instrument or connected with its limitations. As to the twenty-one year period, the Rule is not quite so strict. Thus if Andrew Baker devises property to James Thorpe and his heirs "for the lives of James and all of his descendants living at the time of my death and for such period thereafter as the law permits suspension of vesting and then to the youngest living descendant of John Stiles" the words "such period thereafter as the law permits" are construed to mean twenty-one years, and the future interest of the youngest descendant of John Stiles is, accordingly, valid.¹¹⁶

¹¹⁵ 279 Mich. 518, 272 N.W. 891, 110 A.L.R. 1346 (1937). Both land and personalty were involved. In *Otis v. Arntz*, 198 Mich. 196, 164 N.W. 498 (1917), land and personalty were devised to descendants of the testator to be ascertained twenty-five years after his death. The disposition was held void as violating the statute prohibiting suspension of the absolute power of alienation. Of course, it also violated the common-law Rule Against Perpetuities.

¹¹⁶ *Pownall v. Graham*, 33 Beav. 242, 55 Eng. Rep. 360 (1863); *Fitchie v. Brown*, 211 U.S. 321 (1908); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§219, 219b (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §495 (1936); *PROPERTY RESTATEMENT*, §370, *Comment n.* and *Illustration 4* (1944). In *West Texas Bank & Trust Co. v. Matlock*, 212 S.W. 937 (Tex. Com. App. 1919), "a reasonable time" was construed to mean twenty-one years.

The computation of the permissible period under the Rule Against Perpetuities may involve one, two, or all of the three elements, lives in being, periods of gestation, and twenty-one years. When more than one of these elements is involved in a situation, a period of gestation may precede or follow either or both of the others. Thus, as has been seen, if John Stiles devises property to James Thorpe and his heirs "until my youngest grandchild is of age and then to my youngest descendant in being at that time," a period of gestation may precede the measuring life in being of John's child, a second period of gestation may follow the life and precede the minority of the grandchild, and a third period of gestation may follow that minority. The element of twenty-one years, however, although it may follow lives in being, may not precede them, because the only permissible lives in being are lives in being at the commencement of the period of the Rule.¹¹⁷ If John Stiles devises property to James Thorpe and his heirs "until the death of all of my descendants living twenty-one years after my death and then to my youngest descendant living at that time," the executory interest is void. John may have descendants in being twenty-one years after his death who were not in being when he died.

Even though an instrument in terms suspends the vesting of a future interest until the happening of an event which may not occur within the period of the Rule, the interest is not void if it could not vest beyond the period, because the duration of the estate out of which it is created is limited. If Andrew Baker, owning an estate in Blackacre for the lives of Thomas Kempe, Roger White and Edward Willis, conveys his estate "to

¹¹⁷ PROPERTY RESTATEMENT, §374, *Comment e.* (1944); 2 Simes, *LAW OF FUTURE INTERESTS*, §493 (1936).

James Thorpe and his heirs so long as the Penobscot Building shall stand and then to John Stiles and his heirs," the executory interest of John Stiles is valid because it cannot vest after the death of the survivor of Thomas Kempe, Roger White, and Edward Willis.¹¹⁸ This is probably an exception to the rule that the measuring lives must be ascertained by the instrument creating the future interest.

If an instrument postpones the vesting of a future interest until the happening of both of two conditions, one of which must occur within the period of the Rule and the other of which may not so occur, the future interest is void. If John Stiles devises property to James Thorpe and his heirs "for thirty years and until my children are all dead and then to my youngest descendant living at that time," the future interest is invalid.¹¹⁹ If, on the other hand, the instrument postpones vesting only until the happening of that one of two alternative conditions which first occurs, the fact that one of the conditions might not be performed within the period of the Rule will not invalidate the future interest. *In re Lamb's Estate*¹²⁰ involved a will which left the estate to nine brothers and sisters of the testatrix and provided:

"But in case of the death of any of the above-named legatees previous to the probating or execution of this,

¹¹⁸ *Low v. Burton*, 3 P. Wms. 262, 24 Eng. Rep. 1055 (1734); *Gray*, *RULE AGAINST PERPETUITIES*, 3rd ed., §§225, 226 (1915); *PROPERTY RESTATEMENT*, §370, *Comment k.* (1944). If the estate conveyed is one for the lives of ascertained living persons, it cannot violate the Rule because it cannot vest after the death of the survivor of those persons.

¹¹⁹ *PROPERTY RESTATEMENT*, §374, *Comment g.* and *Illustration 7* (1944).

¹²⁰ 122 Mich. 239, 80 N.W. 1081 (1899). Both land and personalty were involved. *Cf. Calkins v. Smith*, 41 Mich. 409, 1 N.W. 1048 (1879); *Skinner v. Taft*, 140 Mich. 282, 103 N.W. 702 (1905).

my last will and testament, then I desire, will and bequeath that the share of such deceased brother or sister shall revert to, and become the property of, the children of said deceased legatee; but, if said deceased legatee has no children living at the time of my decease, then the said deceased legatee's share of the property bequeathed to him or her by the terms of this will shall revert to, and become a part of, the general fund to be divided among the surviving legatees named in this will."

One of the brothers assigned his interest under the will and died before the estate of the testatrix was ready for distribution. The Court held that "execution" meant distribution and that the children of the brother, not his assignee, were entitled to the share which would have been his. This was a sound result because, although distribution might not occur within the period of the Rule,¹²¹ the gift over would necessarily vest, if at all, on the death of the survivor of the brothers and sisters.

¹²¹ 2 Simes, *LAW OF FUTURE INTERESTS*, §496 (1936); *PROPERTY RESTATEMENT*, §374, *Comment f.* (1944). But see: *Brandenburgh v. Thorn-dike*, 139 Mass. 102, 28 N.E. 575 (1885); *Belfield v. Booth*, 63 Conn. 299, 27 Atl. 585 (1893).

CHAPTER 11

The Requirement of Certainty of Vesting

A. CERTAINTY

TO SATISFY the Rule Against Perpetuities, a future interest must be so limited that at the commencement of the period of the Rule,¹²² it is certain that the interest must vest, if at all, within the period. This does not mean that the interest must be certain to vest; if it did a future interest could not be limited to an unborn person. What it does mean is that there must be certainty that the interest cannot vest at some time beyond the period of the Rule.¹²³ If Andrew Baker conveys property to John Stiles, who has no children, for life, remainder to the eldest son of John, the contingent remainder may never vest because John may not have a son. But the remainder will either vest or fail at the death of John, so it is valid under the Rule.¹²⁴

The time when the certainty must exist is that of the commencement of the period of the Rule. Events which occur before the commencement of the period are considered in determining the validity of a limitation.¹²⁵ If

¹²² As to which see Chapter 10, §A, *supra*.

¹²³ Challis, *LAW OF REAL PROPERTY*, 3rd ed., 180 (1911); Simes, *HANDBOOK ON THE LAW OF FUTURE INTERESTS* 370 (1951).

¹²⁴ See, e.g., *Stevens v. Wildey*, 281 Mich. 377, 275 N.W. 179 (1937).

¹²⁵ *Vanderplank v. King*, 3 Hare 1 at 17, 67 Eng. Rep. 273 at 279-280 (1843); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §231 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §494 (1936); *PROPERTY RESTATEMENT*, §370, *Comment m.*, §374, *Comment k.* (1944). In *Mullreed v. Clark*, 110 Mich. 229 at 233, 68 N.W. 138 (1896) the Court quoted the cited section of Gray with approval and applied the rule stated to a disposition governed by the statute prohibiting suspension of the absolute power of alienation.

John Stiles devises property to James Thorpe on trust to pay the income to John's children for life, then to their children until the youngest reaches twenty-five, and then to transfer the principal to John's grandchildren living at that time, the disposition of the principal is invalid if John has children living at the time of his death.¹²⁶ If, however, John's children predecease him, that fact is considered in applying the rule and the limitation of the principal is good. Events which occur after the commencement of the period of the Rule are not considered in determining the validity of a limitation.¹²⁷ In *Michigan Trust Co. v. Baker*,¹²⁸ testatrix devised land to her husband until death or remarriage, then to a trustee to sell the land and hold the proceeds in trust to pay half the income to a son, Stuart, for life. The will, as construed by the Court, gave the remainder in half the corpus, after the death of Stuart, to those daughters of Stuart who reached twenty-five and those sons of Stuart who reached thirty, but if none did so to testatrix's son Looe and his children. Testatrix died in 1913,

¹²⁶ *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924); *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N.W. 703 (1930); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934), discussed above at Part Two, notes 88, 102-104.

¹²⁷ *Viscount Dungannon v. Smith*, 12 Cl. & F. 546, 8 Eng. Rep. 1523 (1846); 2 Simes, *LAW OF FUTURE INTERESTS*, §496 (1936); *PROPERTY RESTATEMENT*, §370, *Comment k.* (1944). *Contra*: *Story v. First National Bank & Trust Co.*, 115 Fla. 436, 156 So. 101 (1934); *PENNA. STAT. ANN.*, Tit. 20, §301.4 (1950). *Merchants National Bank v. Curtis*, 98 N.H. 225, 97 A. (2d) 207 (1953); *Mass. Gen. Laws*, c. 184 A (1954). There is an exception in the case of future interests created by the exercise of powers of appointment. Chapter 13, Section C, *infra*. The rule stated in the text has been criticized. Sweet, "The Monstrous Regiment of the Rule Against Perpetuities," 18 *JURID. REV.* 132 at 157-158 (1906); Leach, "Perpetuities in Perspective," 65 *HARV. L. REV.* 721 at 728-730 (1952); Leach, "Perpetuities Legislation, Massachusetts Style," 67 *HARV. L. REV.* 1349 (1954). See: Simes, "Is the Rule Against Perpetuities Doomed? The 'Wait and See' Doctrine," 52 *MICH. L. REV.* 179 (1953).

¹²⁸ 226 Mich. 72, 196 N.W. 976 (1924).

and Stuart died in 1915 without issue. The court held the disposition of the corpus void because, at the time of the testatrix's death, it was possible that Stuart might have children, saying:

"The court must be able to say, to avoid the rule, that to a certainty the estate will vest within 21 years after the death of Stuart and Looe, and this vesting must be found to have been discernible at the date of the death of the testatrix. At that time Stuart and Looe were both living but had no children. Certainty as to time the estate will vest must be apparent unaided by events subsequent to the date the will became operative."¹²⁹

The certainty of vesting required by the Rule Against Perpetuities is absolute certainty; a high degree of probability is not enough. If, at the commencement of the period, any combination of future events which would postpone vesting beyond the period is possible, the future interest is void, although the actual occurrence of that combination of events is highly unlikely.¹³⁰ If John Stiles devises property "to my brother Henry for life, remainder to my brother Henry's widow for life, remainder to the oldest male descendant of my brother Henry living at the death of his widow" the ultimate remainder is void even though, when John dies, his brother Henry is eighty and has a wife the same age.¹³¹

¹²⁹ 226 Mich. 72 at 77. Cf. *Dean v. Mumford*, 102 Mich. 510, 61 N.W. 7 (1894), holding that the fact that testator's widow elected to take against the will could not be considered in determining the validity of a disposition under the statute forbidding suspension of the absolute power of alienation.

¹³⁰ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §214 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §496 (1936); *PROPERTY RESTATEMENT*, §370, *Comment k.* (1944).

¹³¹ *Hodson v. Ball*, 14 Sim. 558, 60 Eng. Rep. 474 (1845); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §214 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §496 (1936); *PROPERTY RESTATEMENT*, §370, *Comment k.* (1944). In *Dean v. Mumford*, 102 Mich. 510, 61 N.W. 7 (1894), land was devised upon trust for two sons, their wives and children, for the lives of the sons and their wives, then to the children

Henry's present wife may die and he may marry a woman who was not in being at the death of John. In that event vesting would be postponed until the end of a life not in being at the commencement of the period. It is unlikely that Henry will marry a woman more than eighty years younger than himself, but he may possibly do so.

Provisions in wills postponing distribution until some administrative step, such as probating the will, paying debts, completion of administration, winding up of a business or sale of property, is taken are frequent causes of difficulty. Whenever possible, such provisions are construed to postpone only enjoyment, not vesting.¹³² In *Skinner v. Taft*,¹³³ a direction in a will that the executors transfer property to four named persons and their heirs and assigns, "after the payment of my just debts and funeral expenses" and upon the termination of a trust which was to terminate "five years from the date of the probating of my will in the County of which I may die

and their heirs and assigns. The trust was held invalid for violation of the statute prohibiting suspension of the absolute power of alienation, but the Court thought that the reference to the sons' wives was to wives living at the testator's death. So construed, the trust would not violate the common-law Rule Against Perpetuities. *Conover v. Hewitt*, 125 Mich. 34, 83 N.W. 1009 (1900), involved a conveyance of land upon trust for William for life, then for his wife and children for her life, remainder to the children. The Court held that, under the language of the deed in question, "children" meant those children living at the death of William so that their interests vested indefeasibly at his death. With this construction, the remainder would not have violated the common-law Rule. Another provision of the instrument limited interests to persons to be determined on the death of William's wife if he had no children. If the word "wife" included anyone whom William might marry after the date of the conveyance, these provisions would have violated the common-law Rule.

¹³² 2 Simes, *LAW OF FUTURE INTERESTS*, §496 (1936); *PROPERTY RESTATEMENT*, §374, *Comment f.* (1944). See: *Fitzgerald v. City of Big Rapids*, 123 Mich. 281, 82 N.W. 56 (1900) (payment of debts and other legacies); *McGraw v. McGraw*, 176 Fed. 312 (6th Cir. 1910) (payment of debts). Cf. *De Buck v. Bousson*, 295 Mich. 164, 294 N.W. 135 (1940).

¹³³ 140 Mich. 282, 103 N.W. 702 (1905). Cf. *In re Mallory's Estate*, 127 Mich. 119, 86 N.W. 541, 89 N.W. 348 (1901).

a resident," was treated as valid, presumably on the theory that the interests vested at the death of the testator and only enjoyment was postponed. If such a provision does postpone vesting until the taking of some administrative action, such as probating the will, which may not occur within twenty-one years, the interests so postponed are void, even though that action would normally be completed well within the permissible period.¹³⁴ Thus in *Battelle v. Parks*,¹³⁵ it was suggested that land could not be devised beneficially to the administrator of the testator's estate, because it is uncertain when an administrator will be appointed. It should be recalled, however, that if vesting is postponed only until the happening of that one of two alternative conditions which

¹³⁴ 2 Simes, *LAW OF FUTURE INTERESTS*, §496 (1936); Note, 37 MICH. L. REV. 814 (1939); PROPERTY RESTATEMENT, §374, *Comment f.* (1944). But see: *Brandenburgh v. Thorndike*, 139 Mass. 102, 28 N.E. 575 (1885); *Belfield v. Booth*, 63 Conn. 299, 27 Atl. 585 (1893). In *re Wood*, [1894] 3 Ch. 381 (C.A.), involved a bequest to issue of the testator living when his gravel pits should be exhausted. Although the pits would have been exhausted in four years after the testator's death if worked at the usual rate and they were in fact exhausted in six years, the bequest was held void because the pits might not have been exhausted within twenty-one years. In *re Bewick*, [1911] 1 Ch. 116, involved a devise to trustees to pay off a £1000 mortgage from income and then to convey to the testator's issue living when the mortgage was paid. Although the normal income was sufficient to pay off the mortgage in five years, the interest of the issue was held void because the income might possibly decrease, thus preventing paying off the mortgage within twenty-one years. The rule that postponement of vesting until probate or administration violates the Rule Against Perpetuities is criticized in Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.23 (1952).

¹³⁵ 2 Mich. 531 (1853). The case involved the statute prohibiting suspension of the absolute power of alienation, which allowed no period in gross, but the problem can arise under the common-law Rule Against Perpetuities. Cf. *Thatcher v. Wardens & Vestrymen of St. Andrew's Church of Ann Arbor*, 37 Mich. 264 (1877), where the Court assumed that a direction to pay the expenses of the last illness and funeral of a life *cestui* could suspend the absolute power of alienation. The facts are not stated in the official report but are set out in *Records & Briefs*, June Term, 1877, #36.

first occurs, the fact that one of the conditions might not be performed within the period of the Rule Against Perpetuities, will not invalidate the interest in question. *In re Lamb's Estate*¹³⁶ involved a will which left the estate to nine brothers and sisters of the testatrix and provided that if any legatee should die before the estate was ready for distribution his share should pass to his children. The shifting executory interests were properly treated as valid because they would necessarily vest, if at all, on the deaths of the legatees. Similarly, in *Schiffer v. Brenton*,¹³⁷ a provision in a will that if any legatee contested it his interest would shift to the other legatees was held valid. A contest by a named legatee would necessarily be commenced during his lifetime.

For the purpose of determining certainty of vesting under the Rule Against Perpetuities, every human being is treated as being capable of having children, regardless of age or physical condition.¹³⁸ This is a conclusive presumption of law which cannot be rebutted by evidence that the person is incapable of having children.¹³⁹ If

¹³⁶ 122 Mich. 239, 80 N.W. 1081 (1899), Part Two, note 120 *supra*.

¹³⁷ 247 Mich. 512, 226 N.W. 253 (1929). Cf. *Fitzgerald v. City of Big Rapids*, 123 Mich. 281, 82 N.W. 56 (1900), where a gift to named legatees in the event the city refused to accept a bequest for library purposes was treated as valid. This was much more questionable than the provisions in *Schiffer v. Brenton* as the life of the city could not be a measuring life under the Rule. In *Moss v. Axford*, 246 Mich. 288, 224 N.W. 425 (1929), a bequest of the residue to the executor, "with the instructions to pay the same to the person who has given me the best care in my declining years and who in his opinion is the most worthy of my said property," was held valid. If the discretionary power to select the legatee was confined to the named executor, the legacy would necessarily vest, if at all, during the life of the executor.

¹³⁸ *Jee v. Audley*, 1 Cox 324, 29 Eng. Rep. 1186 (1787); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §215 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §497 (1936); *PROPERTY RESTATEMENT*, §377 (1944); Annotations, 67 A.L.R. 539 (1929); 146 A.L.R. 794 (1943). *Contra*: *Exham v. Beamish* [1939] I.R. 336.

¹³⁹ Although irrebuttable for purposes of determining the validity of future interests under the Rule Against Perpetuities, there is

John Stiles devises property to "my mother for life, remainder to her children for their lives, remainder to her youngest grandchild living at the death of the survivor of her children," the ultimate remainder is void even if John's mother is ninety-eight years old at the time of his death.¹⁴⁰ An English court has even suggested that a child is conclusively presumed to be capable of having children before reaching the age of five years.¹⁴¹ Unless the word "children" as used in the limitation includes adopted children,¹⁴² the conclusive presumption of law that all persons are capable of having children throughout their lives sometimes requires the treatment as possible that which is factually impossible. For this reason the presumption has been criticized.¹⁴³ It does have the virtue of increasing the certainty of the law of property

English and some American authority for permitting the presumption of possibility of issue to be rebutted in suits to terminate trusts where the only non-consenting beneficiaries are the unborn children of a person who, because of age, disease, or surgery is in fact incapable of having children. *Leng v. Hodges*, Jacobs 585, 37 Eng. Rep. 971 (1822); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., 191n (1915); *TRUSTS RESTATEMENT*, §340, *Comment c.* (1935); *PROPERTY RESTATEMENT*, §274 (1940).

¹⁴⁰ *Ward v. Van der Loeff*, [1924] A.C. 653. In this country, if the context permits, the word "children" in such a limitation [i.e., to the children of a person whom the testator knows to be beyond the age of child-bearing] tends to be construed to mean children living at the time of the testator's death. *Wright's Estate*, 284 Pa. 334, 131 Atl. 188 (1925); *Worcester County Trust Co. v. Marble*, 316 Mass. 294, 55 N.E. (2d) 446 (1944); *PROPERTY RESTATEMENT*, §377, *Comment c.* (1944). Such a construction would make the limitation valid.

¹⁴¹ *Re Gaite's Will Trusts*, [1949] 1 All E.R. 459 at 460. The disposition in question was held valid, however, on the ground that, because English law does not permit a child under five to marry, such a child could not have legitimate issue.

¹⁴² A limitation to the children of a named person ordinarily does not include adopted children except where an intent to include them is found from additional language or circumstances. *Russell v. Musson*, 240 Mich. 631, 216 N.W. 428 (1927); *PROPERTY RESTATEMENT*, §287 (1940). Some modern adoption statutes may alter this rule. E.g., *REV. STAT. MO.* (1949) §453.090.

¹⁴³ E.g., Leach, "Perpetuities in Perspective," 65 *HARV. L. REV.* 721 at 731-734 (1952).

by making it possible to ascertain the validity of limitations of future interests without awaiting the settlement by litigation of doubtful questions of fact.¹⁴⁴ At any rate, Michigan follows the presumption. In *Gettins v. Grand Rapids Trust Co.*,¹⁴⁵ property was bequeathed to a trustee to pay the income to the testatrix's daughter Belle for life, and then to her children and to transfer a share in the corpus to each child of Belle on reaching twenty-five, with limitations over in the event of any child dying under twenty-five. Although Belle was fifty-two and childless, the provisions as to the limitations over were held void because they might postpone vesting until more than twenty-one years after her death, the Court saying that Belle must be considered as capable of having issue as long as she lived.

B. THE CONCEPT OF VESTING IN ENGLISH LAW

As has been seen, at the time of its reception in this country, English law permitted the creation in persons other than the grantor or testator of three types of future interests¹⁴⁶ in property, remainders,¹⁴⁷ *interestia*

¹⁴⁴ 2 Simes, *LAW OF FUTURE INTERESTS*, §497 (1936).

¹⁴⁵ 249 Mich. 238, 288 N.W. 703 (1930). The case involved a devise of land with a mandatory direction to convert to personalty so the common-law Rule applied. Accord under the statute prohibiting suspension of the absolute power of alienation: *Rozell v. Rozell*, 217 Mich. 324, 186 N.W. 489 (1922) (man aged 44). See: *Van Gallow v. Brandt*, 168 Mich. 642 at 647, 134 N.W. 1018 (1912) (woman aged 68; suggestion that it would make no difference if she were 100).

¹⁴⁶ Professor Simes defines a future interest as "an interest in land or other things in which the privilege of possession or of enjoyment is future and not present." 1 *LAW OF FUTURE INTERESTS*, §1 (1936). For more extended discussions of the rules of vesting in Anglo-American law see Simes, *Id.*, §§64-158; Fearn, *CONTINGENT REMAINDERS*, 10th ed. (1844); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§99-118, 970-974 (1915); *PROPERTY RESTATEMENT*, §§157, 158 and comments (1936); 2 Powell, *LAW OF REAL PROPERTY*, §§275-279 (1950); Simes, "Types of Future Interests," 1 *AMERICAN LAW OF PROPERTY*, §§4.33-4.36, 4.53-4.58 (1952).

¹⁴⁷ Part One, notes 351, 352, 358, 359, 363; Part Two, notes 5-21 *supra*.

termini,¹⁴⁸ and executory interests.¹⁴⁹ At common law a remainder is a future freehold estate in land so limited as to become possessory immediately upon the termination of a preceding estate for life or in tail created by the same conveyance or will.¹⁵⁰ A remainder is contin-

¹⁴⁸ Part One, notes 355, 359, 363, *supra*. An *interesse termini* is a legal estate for years in land, limited to an ascertained living person, to commence on a fixed future date. If Andrew Baker on January 1, 1954, leases land to John Stiles for a term of forty years, to commence July 1, 1990, the interest of John is an *interesse termini*. Such an interest is not subject to the Rule Against Perpetuities. *Mann, Crossman & Paulin, Ltd. v. Registrar of Land Registry*, [1918] 1 Ch. 202; Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§117, 320n (1915). See: *Smith v. Day*, 2 M. & W. 684, 150 Eng. Rep. 931 (1837); *Gillard v. Cheshire Lines Committee*, 32 W.R. 943 (C.A. 1884); *Redington v. Browne*, 32 L.R. (Ir.) 347 at 356 (1893); *Knight v. City of London Brewery Co.*, [1912] 1 K.B. 10; Challis, *LAW OF REAL PROPERTY*, 3rd ed., 472-473 (1911). At common law, prior to the statutes of Uses and Wills, an estate for years could not be limited to commence on the happening of an event uncertain to occur. *Green v. Edwards*, Cro. Eliz. 216, 78 Eng. Rep. 472 (1591). Hence, a limitation of a term of years or an interest therein to an unborn or unascertained person or contingent upon an uncertain event is not an *interesse termini* but an executory interest, to which the Rule Against Perpetuities does apply. *Redington v. Browne*, 32 L.R. (Ir.) 347 (1893); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §320n. (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §498 (1936).

¹⁴⁹ Part One, notes 355, 359, 363; Part Two, notes 23, 25, 26, *supra*.

¹⁵⁰ Part Two, *supra*, at notes 6-21. *Fearne, CONTINGENT REMAINDERS*, 10th ed., 3-4 [Butler's Note (c)] (1844); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §8 (1915); *PROPERTY RESTATEMENT*, §156 (1936); Simes, "Types of Future Interests," 1 *AMERICAN LAW OF PROPERTY*, §4.25 (1952). A freehold estate limited unconditionally to an ascertained living person, to follow an estate for years, whenever and however the estate for years terminates, although frequently referred to as a remainder, is technically a present estate subject to a term. If Andrew Baker conveys land to James Thorpe for forty years, remainder to John Stiles and his heirs, John takes a present estate in fee simple which is vested and not subject to the Rule Against Perpetuities. *Boraston's Case*, 3 Co. Rep. 19a, 76 Eng. Rep. 668 (1587); *Smith ex dem. Dormer v. Packhurst*, 3 Atk. 135, 26 Eng. Rep. 881 (1742); *DeGrey v. Richardson*, 3 Atk. 469, 26 Eng. Rep. 1069 (1747); Smith, *EXECUTORY INTERESTS*, ed. 1844, §§253, 760; Challis, *LAW OF REAL PROPERTY*, 3rd ed., 80, 99 (1911); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§8, 970n (1915); 1 Simes, *LAW OF FUTURE INTERESTS*, §62 (1936); *PROPERTY RESTATEMENT*, §156, *Comment e*. (1936). This is true even though the estate for years is subject to a special limitation. If Andrew Baker conveys land to James Thorpe for forty years if the Penobscot Building so long stands, remainder to John Stiles and his

gent (not vested) if it is subject to a condition precedent which may not occur at or before the expiration of the preceding particular estate.¹⁵¹ If Andrew Baker conveys land to James Thorpe for life, remainder to John Stiles if John marries Lucy Baker, the remainder is contingent until John marries Lucy. A remainder is vested if it is not subject to any condition precedent except the termination of the preceding estate.¹⁵² This being so, a re-

heirs, John takes a present estate in fee simple which is, of course, vested. If, however, a freehold estate is limited to cut off or follow a term of years only if an uncertain event occurs, it is an executory interest. If Andrew Baker conveys land to James Thorpe for forty years but, if the Penobscot Building falls at or before the expiration of the term, to John Stiles and his heirs, the interest limited to John is an executory future interest which is void because it may not vest within the period of the Rule Against Perpetuities. *Gore v. Gore*, 2 P. Wms. 28, 24 Eng. Rep. 629 (1722); Smith, *EXECUTORY INTERESTS*, ed. 1844, §§121-124; Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§58, 59 (1915); 1 Simes, *LAW OF FUTURE INTERESTS*, §§62, 155 (1936); *PROPERTY RESTATEMENT*, §156, *Comment e.* (1936); Simes, "Types of Future Interests," 1 *AMERICAN LAW OF PROPERTY*, §§4.31, 4.55 (1952). See: *Green v. Edwards*, Cro. Eliz. 216, 150 Eng. Rep. 472 (1591).

¹⁵¹ *Beverley v. Beverley*, 2 Vern. 131, 23 Eng. Rep. 692 (1690); *Festing v. Allen*, 12 Mees. & W. 279, 152 Eng. Rep. 1204 (1843); Fearn, *CONTINGENT REMAINDERS*, 10th ed., 5-9 and Butler's Note (g) (1844); Digby, *HISTORY OF THE LAW OF REAL PROPERTY*, 5th ed., 266 (1897); Challis, *LAW OF REAL PROPERTY*, 3rd ed., 75, 128 (1911); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§9, 101 (1915); 1 Simes, *LAW OF FUTURE INTERESTS*, §§68, 69 (1936); Simes, "Types of Future Interests," 1 *AMERICAN LAW OF PROPERTY*, §4.36 (1952). See: *Smith ex dem. Dormer v. Packhurst*, 3 Atk. 135 at 139, 26 Eng. Rep. 881 at 883 (H.L. 1742). So a remainder is contingent even though limited on a condition which must occur, such as the death of a person or the coming of a fixed future date, if the condition is not certain to occur at or before the termination of the preceding estate, whenever and however that termination may occur. If Andrew Baker conveys land to James Thorpe for life, remainder to John Stiles and his heirs if Lucy Baker dies, the remainder is contingent. Lucy must necessarily die, but she may not die at or before the termination of the life estate. *Colthirst v. Bejushin*, 1 Plow. Comm. 21, 75 Eng. Rep. 33 (1550); *Beverley v. Beverley*, *supra*.

¹⁵² *Webb v. Hearing*, Cro. Jac. 415, 79 Eng. Rep. 355 (1616); *Luxford v. Cheeke*, 3 Lev. 125, 83 Eng. Rep. 611 (1683); Digby, *HISTORY OF THE LAW OF REAL PROPERTY*, 5th ed., 265 (1897); Challis, *LAW OF REAL PROPERTY*, 3rd ed., 146 (1911); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §970 (1915); 1 Simes, *LAW OF FUTURE INTERESTS*, §67 (1936). This is so only if the remainder, throughout its continuance, will take

mainder may be vested although it is not presently possessory and may never become so.¹⁵³ If Andrew Baker conveys land to Roger White for life, remainder to Lucy Baker for life, remainder to James Thorpe in tail, remainder to John Stiles in fee simple, all three remainders are vested because none is subject to any condition precedent except the termination of the preceding estate or estates. This is so as to Lucy Baker's life estate although it will never become possessory unless she survives James Thorpe.¹⁵⁴ As the Rule Against Perpetuities prohibits only remoteness of vesting, not remoteness of possession, the remainder to John Stiles is valid under the Rule although it will not become possessory until the last lineal descendant of James Thorpe dies, which

effect on the termination of the preceding estate, whenever and however such termination occurs. If the remainder is conditional upon the preceding estate terminating in a particular manner, it is contingent. If Andrew Baker conveys land to James Thorpe for life, remainder to John Stiles and his heirs, the remainder is vested. If Andrew Baker conveys land to James Thorpe for life, remainder if, but only if, the life estate terminates by the death of James, to John Stiles and his heirs, the remainder is contingent because the life estate may terminate in some other manner than the death of James, as by forfeiture or surrender. FEARNE, *CONTINGENT REMAINDERS*, 10th ed., 5 and Butler's Note (d) (1844).

¹⁵³ FEARNE, *CONTINGENT REMAINDERS*, 10th ed., 216 (1844); Digby, *HISTORY OF THE LAW OF REAL PROPERTY*, 5th ed., 265 (1897); Challis, *LAW OF REAL PROPERTY*, 3rd ed., 74, 127, 146 (1911); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §102 (1915); Simes, "Types of Future Interests," 1 *AMERICAN LAW OF PROPERTY*, §4.35 (1952). See: *Smith ex dem. Dormer v. Packhurst*, 3 Atk. 135 at 138, 26 Eng. Rep. 881 at 883 (H.L. 1742).

¹⁵⁴ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §102 (1915); 1 Simes, *LAW OF FUTURE INTERESTS*, §§69, 72 (1936); *PROPERTY RESTATEMENT*, §157, *Comment f.*, Special Note, *Comment p.*, Ill. 11 (1936); 2 Powell, *LAW OF REAL PROPERTY*, §274 (1950); Simes, "Types of Future Interests," 1 *AMERICAN LAW OF PROPERTY*, §4.35 (1952). See: *Webb v. Hearing*, Cro. Jac. 415, 79 Eng. Rep. 355 (1616); *Boreton v. Nicholls*, Cro. Car. 363, 79 Eng. Rep. 917 (1634); *Badger v. Lloyd*, 1 Salk. 232, 91 Eng. Rep. 206 (1696); *Croxall v. Shererd*, 5 Wall. 268 at 287-288 (1866). Lucy's life estate would be vested even if Roger's preceding life estate were on special limitation, e.g., "to Roger White for life if he shall so long remain in the Ready Reserve, remainder to Lucy Baker for life."

may occur at a time beyond the period of the Rule.¹⁵⁵ Similarly, if Andrew Baker conveys land to Lucy Baker, now unmarried and childless, for life, remainder to the eldest child of Lucy for life, remainder to John Stiles in fee simple, the estate of John Stiles is both vested and valid although it may not become possessory until the end of a life not now in being and follows in time a remainder which is contingent.¹⁵⁶

At common law a remainder limited to a person not in being or not presently ascertainable is contingent because it is subject to the condition precedent of the remainderman coming into being or becoming ascertainable.¹⁵⁷ If Andrew Baker conveys land to Lucy Baker, now unmarried and childless, for life, remainder to the eldest child of Lucy, the remainder is contingent. So, where the Rule in Shelley's Case has been abolished, if

¹⁵⁵ *Webb v. Hearing*, Cro. Jac. 415, 79 Eng. Rep. 355 (1616); *Udal v. Udal*, Aleyn 81, 82 Eng. Rep. 926 (1648); Fearn, *CONTINGENT REMAINDERS*, 10th ed., 223 (1844); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §111 (1915); 1 Simes, *LAW OF FUTURE INTERESTS*, §§69, 72 (1936); Simes, "Types of Future Interests," 1 *AMERICAN LAW OF PROPERTY*, §4.35 (1952). See: *Badger v. Lloyd*, 1 Salk. 232, 91 Eng. Rep. 206 (1696). John's remainder in fee simple would be vested even if James' preceding estate tail were on special limitation, e.g., "to James Thorpe and the heirs of his body so long as they bear the name and arms of Baker, remainder to John Stiles and his heirs."

¹⁵⁶ *Udal v. Udal*, Aleyn 81, 82 Eng. Rep. 926 (1648); Fearn, *CONTINGENT REMAINDERS*, 10th ed., 223 (1844); 1 Simes, *LAW OF FUTURE INTERESTS*, §§69, 73 (1936); *PROPERTY RESTATEMENT*, §157, *Comment f.* (1936); Simes, "Types of Future Interests," 1 *AMERICAN LAW OF PROPERTY*, §4.33 (1952). See: Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §117a (1915). Cf. the rule stated in Part Two, note 161 *infra*, that every interest subsequent to an executory interest is itself executory.

¹⁵⁷ *Kent v. Harpool*, 1 Vent. 306, 86 Eng. Rep. 197 (1678); Fearn, *CONTINGENT REMAINDERS*, 10th Ed., 9 (1844); Challis, *LAW OF REAL PROPERTY*, 3rd ed., 131 (1911); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §9 (1915); 1 Simes, *LAW OF FUTURE INTERESTS*, §§69, 82 (1936); *PROPERTY RESTATEMENT*, §157, *Comments u., v.* (1936); §370, *Comment i.* (1944); 2 Powell, *LAW OF REAL PROPERTY*, §278 (1950). See: *Smith ex dem. Dormer v. Packhurst*, 3 Atk. 135 at 139, 26 Eng. Rep. 881 at 883 (H.L. 1742).

Andrew Baker conveys land to Lucy Baker for life, remainder to the heirs of Lucy in fee simple, the remainder is contingent until the death of Lucy because her heirs will not be ascertainable until then.¹⁵⁸ Similarly, if Andrew Baker conveys land to John Stiles, who now has ten children, for life, remainder to that child of John's who takes the most care of John in his last illness, the remainder is contingent until the death of John because the remainderman cannot be ascertained until then.¹⁵⁹

A remainder may be vested although it is subject to being defeated by the exercise of a power of appointment or by the operation of a condition subsequent, a special limitation, or an executory limitation.¹⁶⁰ If Andrew Baker conveys land to Lucy Baker for life, remainder

¹⁵⁸ *Challoner and Bowyer's Case*, 2 Leon. 70, 74 Eng. Rep. 366 (1587); *Archer's Case*, 1 Co. Rep. 66b, 76 Eng. Rep. 146 (1597); *Fearne, CONTINGENT REMAINDERS*, 10th ed., 9 (1844); *Challis, LAW OF REAL PROPERTY*, 3rd ed., 75, 131 (1911); *Gray, RULE AGAINST PERPETUITIES*, 3rd ed., §109 (1915); 1 *Simes, LAW OF FUTURE INTERESTS*, §§69, 83 (1936); *PROPERTY RESTATEMENT*, §157, *Comment u.*, III. 26 (1936); *Simes, "Types of Future Interests," 1 AMERICAN LAW OF PROPERTY*, §§4.2, 4.25 (1952). See: *Egerton v. Earl Brownlow*, 4 H.L.C. 1 at 81, 10 Eng. Rep. 359 at 392 (1853). However, a remainder to the "heirs" of a living person is vested if the word "heirs" is not used in its technical sense but as a designation of presently ascertainable existing persons, such as presently living children or the persons who would be heirs if the ancestor died presently. *Darbison ex dem. Long v. Beaumont*, 1 P. Wms. 229, 24 Eng. Rep. 366 (1713), *aff'd.*, 3 Brown 60, 1 Eng. Rep. 1177 (1714); *Goodright ex dem. Brooking v. White*, 2 Wm. Bl. 1010, 96 Eng. Rep. 593 (1775).

¹⁵⁹ *Biggot v. Smyth*, Cro. Car. 102, 79 Eng. Rep. 691 (1628); *Quarm v. Quarm*, [1892] 1 Q.B. 184 (C.A.); *Challis, LAW OF REAL PROPERTY*, 3rd ed., 131 (1911); 1 *Simes, LAW OF FUTURE INTERESTS*, §82 (1936).

¹⁶⁰ *Cunningham v. Moody*, 1 Ves. Sen. 174, 27 Eng. Rep. 965 (1748); *Doe ex dem. Willis v. Martin*, 4 T.R. 39, 100 Eng. Rep. 882 (1790); *Fearne, CONTINGENT REMAINDERS*, 10th ed., 226-227 (1844); *Challis, LAW OF REAL PROPERTY*, 3rd ed., 75 (1911); *Gray, RULE AGAINST PERPETUITIES*, 3rd ed., §§102, 103, 112 (1915); 1 *Simes, LAW OF FUTURE INTERESTS*, §§57, 69, (1936); *PROPERTY RESTATEMENT*, §157, *Comments p., q., r., s.* (1936); 2 *Powell, LAW OF REAL PROPERTY*, §277 (1950). *Simes, "Types of Future Interests," 1 AMERICAN LAW OF PROPERTY*, §4.35 (1952).

as Lucy may by will appoint and, in default of appointment, to John Stiles in fee subject to the condition that John and his heirs care for Lucy's grave forever, the remainder of John Stiles is vested. If Andrew Baker conveys land to Lucy Baker for life, remainder to John Stiles and his heirs so long as they care for Lucy's grave, the remainder is vested. If Andrew Baker conveys land to Lucy Baker for life, remainder to John Stiles and his heirs, but if Lucy's grave is neglected within twenty years after her death, then to James Thorpe and his heirs, the remainder to John Stiles is vested.

Under the common-law system, every future interest limited to someone other than the grantor or testator which is not a remainder or an *interesse termini* is an executory interest.¹⁶¹ The term includes springing freehold interests in land,¹⁶² shifting freehold interests which cut

¹⁶¹ Fearn, *CONTINGENT REMAINDERS*, 10th ed., 381-386 and Butler's Notes (a) and (b), 401 and Butler's Note (e) (1844); Challis, *LAW OF REAL PROPERTY*, 3rd ed., 76, 168-171 (1911); 1 Simes, *LAW OF FUTURE INTERESTS*, §149 (1936); Simes, "Types of Future Interests," 1 *AMERICAN LAW OF PROPERTY*, §4.53 (1952). Cf. *PROPERTY RESTATEMENT*, §§156, *Comment e.*, 158 (1936). The Restatement classifies *interesse termini* as executory interests and future interests in chattels real and personal, and following chattels real, which would be remainders if they were freehold estates in land expectant upon freehold estates in land, as remainders. The *Restatement* classification reflects fairly widespread American usage.

A limitation subsequent to an executory interest is an executory interest, although it is a freehold estate in land so limited as to become possessory upon the termination of a preceding freehold estate. If Andrew Baker conveys land to James Thorpe and his heirs but, if Lucy Baker die in the lifetime of James, to Roger White for life, remainder to John Stiles and his heirs, the interest of John is executory. Fearn, *CONTINGENT REMAINDERS*, 10th ed., 503 (1844); Challis, *LAW OF REAL PROPERTY*, 3rd ed., 124 (1911). But see Part Two, note 168 *infra*. A freehold interest which follows an estate for years is either a present estate or an executory interest. Part Two, note 150 *supra*.

¹⁶² *Clere's Case*, 6 Co. Rep. 17b, 77 Eng. Rep. 279 (1599); *Davies v. Speed*, 2 Salk. 675, 91 Eng. Rep. 574 (1692); Fearn, *CONTINGENT REMAINDERS*, 10th ed., 399 (1844); 2 Powell, *LAW OF REAL PROPERTY*, §279 (1950); Simes, "Types of Future Interests," 1 *AMERICAN LAW OF PROPERTY*, §4.56 (1952). See: *Badger v. Lloyd*, 1 Salk. 232 at 233, 91

off a prior estate for life¹⁶³ or in tail,¹⁶⁴ freehold interests which follow or cut off a prior estate in fee simple,¹⁶⁵

Eng. Rep. 206 (1696). If Andrew Baker conveys or devises land to John Stiles and his heirs "to commence in possession ten years after my death," the interest of John is a springing executory interest.

¹⁶³ For example, if Andrew Baker conveys land to Lucy Baker for life but, if Lucy remarries, to John Stiles for the life of Lucy, the interest of John is a shifting executory interest. *Brent's Case*, 2 Leon. 14, 74 Eng. Rep. 319 (1575); *Fearne, CONTINGENT REMAINDERS*, 10th ed., 400 (1844). See: *Egerton v. Earl Brownlow*, 4 H.L.C. 1 at 186, 10 Eng. Rep. 359 at 433 (1853). This must be distinguished from an interest following a life estate on special limitation, which is a remainder, not an executory interest. If Andrew Baker conveys land to Lucy Baker until her death or remarriage and, in the event of such remarriage, to John Stiles for the life of Lucy, John takes a contingent remainder. *Fearne, CONTINGENT REMAINDERS*, 10th ed., 10 [Butler's Note (h)], 13, (1844); 2 *Powell, LAW OF REAL PROPERTY*, §279 (1950); 1 *Simes, LAW OF FUTURE INTERESTS*, §154 (1936). See: *Beverley v. Beverley*, 2 Vern. 131, 23 Eng. Rep. 692 (1690); *Egerton v. Earl Brownlow, supra*.

¹⁶⁴ For example, if Andrew Baker conveys land to James Thorpe and the heirs of his body, but if the tenant in tail fail to bear the name and arms of Baker, to John Stiles and the heirs of his body. If, however, an estate tail is on special limitation, an estate limited to take effect upon the operation of the special limitation is a remainder, not an executory interest. If Andrew Baker conveys land to James Thorpe and the heirs of his body so long as they bear the name and arms of Baker and, on their ceasing to do so, to John Stiles and the heirs of his body, John takes a contingent remainder. *Arton v. Hare*, *Popham* 97, 79 Eng. Rep. 1207 (1594); *Fearne, CONTINGENT REMAINDERS*, 10th ed., 5, 13 (1844); 1 *Simes, LAW OF FUTURE INTERESTS*, §154 (1936).

¹⁶⁵ *Hinde and Lyons Case*, 3 Leon. 64, 74 Eng. Rep. 543 (1577); *Pells v. Brown*, Cro. Jac. 590, 79 Eng. Rep. 504 (1620). As there cannot be a remainder on a fee simple (Part Two, note 7 *supra*), a future interest limited on a fee simple is always an executory interest whether or not the fee is on special limitation, that is, whether the future interest is limited to follow or to cut off the preceding fee. If Andrew Baker conveys land to James Thorpe and his heirs so long as they shall bear the name and arms of Baker and then to John Stiles and his heirs (special limitation), or to James Thorpe and his heirs, but if they shall cease to bear the name and arms of Baker to John Stiles and his heirs (conditional limitation), the interest of John Stiles is, in either case, an executory interest (which, of course, violates the Rule Against Perpetuities and so is void). *Fearne, CONTINGENT REMAINDERS*, 10th ed., 12 (1844); *Challis, LAW OF REAL PROPERTY*, 3rd ed., 173 (1911); 1 *Simes, LAW OF FUTURE INTERESTS*, §154 (1936); 2 *Powell, LAW OF REAL PROPERTY*, §279 (1950); *Simes, "Types of Future Interests," 1 AMERICAN LAW OF PROPERTY*, §§4.25, 4.27, 4.55 (1952). See: *Willion v. Berkley*, 1 Plowd. Comm. 223 at 235, 239, 248, 75 Eng. Rep. 339 at 358, 365, 379 (1562); *Earl of*

all future interests in estates for years except the *interesse termini*,¹⁶⁶ and all future interests in chattels personal except, possibly, an interest limited to follow a life estate which modern authorities treat as, or analogous to, a remainder.¹⁶⁷ In strict common-law theory, an executory interest, unlike a remainder, never vests until it becomes possessory.¹⁶⁸ Thus if Andrew Baker conveys to John

Stafford v. Buckley, 2 Ves. Sen. 170, 28 Eng. Rep. 111 (1750). But see Part Two, note 168 *infra*. Compare the different rule as to future interests limited on life estates and fees tail mentioned in the two preceding notes.

¹⁶⁶ Manning's Case, 8 Co. Rep. 94b, 77 Eng. Rep. 618 (1609); Lampet's Case, 10 Co. Rep. 46b, 77 Eng. Rep. 994 (1612); Cotton v. Heath, 1 Eq. Cas. Abr. 191, pl. 2, 21 Eng. Rep. 981 (1638); Fearn, CONTINGENT REMAINDERS, 10th ed., 4 [Butler's Note (c) 2.] (1844); Smith, EXECUTORY INTERESTS, ed. 1844, §756a. Cf. Gray, RULE AGAINST PERPETUITIES, 3rd ed., §117b, App. F. (1915); PROPERTY RESTATEMENT, §156, *Comment e.* (1936); 2 Powell, LAW OF REAL PROPERTY, §§273, 279 (1950). The *Restatement* treats some interests in estates for years as remainders. Part Two, note 161 *supra*. Professor Powell follows the terminology of the *Restatement* but recognizes that the rule stated in the text was that of the English law. As to the *interesse termini*, see Part Two, note 148 *supra*. A freehold estate which follows an estate for years is either a present estate or an executory interest. Part Two, note 150 *supra*.

¹⁶⁷ Hoare v. Parker, 2 T.R. 376, 100 Eng. Rep. 202 (1788); Re Tritton, 61 L.T.R. 301 (Q.B. 1889); Fearn, CONTINGENT REMAINDERS, 10th ed., 4 [Butler's Note (c) 2.] (1844); Part One, notes 409-422 *supra*. Cf. Gray, RULE AGAINST PERPETUITIES, 3rd ed., §117a, App. F (1915); PROPERTY RESTATEMENT, §156, *Comment e.* (1936); Powell, LAW OF REAL PROPERTY, §§273, 279. In Evans v. Walker, [1876] 3 Ch. Div. 211, there was a bequest of chattels personal to Maria Evans for life, then to her children for their lives, then to Edwin, Sally, and Eliza Walker. The interest of the Walkers was treated as a vested remainder and held valid. If an executory interest, it would have violated the Rule Against Perpetuities. Most modern American authority follows the view of this case.

¹⁶⁸ Preston, TREATISE ON ESTATES, 2d ed., 66, 75 (1820); Fearn, CONTINGENT REMAINDERS, 10th ed., 1 [Butler's Note (a)] (1844); Smith, EXECUTORY INTERESTS, ed. 1844, §301; Gray, RULE AGAINST PERPETUITIES, 3rd ed., §114 (1915); Simes, "Types of Future Interests," 1 AMERICAN LAW OF PROPERTY, §4.2 (1952); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 *Id.*, §24.20. See: Gore v. Gore, 2 P. Wms. 28, 24 Eng. Rep. 629 (1722). Cf. PROPERTY RESTATEMENT, §158, *Comment b.* (1936), §370, *Comment o.* (1944); Gray, *Id.*, §§117, 117a. This does not mean that an executory interest was always contingent. Such an interest limited to take effect on an event bound

Stiles an estate in fee simple in land to commence in possession upon the death of Andrew, the estate does not, in theory, vest until Andrew dies. Similarly, if Andrew Baker conveys to John Stiles an estate in fee simple in land to commence in possession ten years after the date of the deed, the estate does not vest until the expiration of the ten years.¹⁶⁹ Logical application of this doctrine would mean that if Andrew Baker conveys to John Stiles an estate in fee simple in land to commence in possession twenty-two years after the date of the deed, the conveyance would be void under the Rule Against Perpetuities because the estate cannot vest within the period of the Rule. Such a result would be absurd, because a conveyance by Andrew Baker to James Thorpe for twenty-two years, remainder to John Stiles in fee, is unquestionably valid.¹⁷⁰ Modern authorities take the

to occur was not contingent. An executory interest of a non-possessory character, such as a beneficial interest under a trust or a profit or easement, would, of course, vest when it becomes presently beneficial. Professor Gray suggested that a future interest in chattels personal, to take effect upon the termination of a prior interest for years, whenever and however the prior interest terminates, and a future interest in chattels personal which would be a vested remainder on a life estate if the property were land, are vested. However that may be, it is settled that a future interest in land which would be a remainder but for the fact that the preceding estate is an executory interest may vest when the preceding interest vests. If Andrew Baker conveys land to James Thorpe and his heirs but, if James die without issue living at the time of his death, to Roger White for life, remainder to John Stiles and his heirs, the interest of John, although originally executory, becomes a vested remainder when James dies without surviving issue. *Lewis Bowles's Case*, 11 Co. Rep. 79b, 77 Eng. Rep. 1252 (1615); Challis, *LAW OF REAL PROPERTY*, 3rd ed., 124 (1911); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §114n.4. (1915); 1 Simes, *LAW OF FUTURE INTERESTS*, §152 (1936); *PROPERTY RESTATEMENT*, §156, *Comment c.*, (1936), §370, *Comment o.* (1944).

¹⁶⁹ *Clere's Case*, 6 Co. Rep. 17b, 77 Eng. Rep. 279 (1599); *Davies v. Speed*, 2 Salk. 675, 91 Eng. Rep. 574 (1692). Professor Simes thinks that such a conveyance can sometimes be construed to create a life estate followed by a remainder. 1 *LAW OF FUTURE INTERESTS*, §150 (1936).

¹⁷⁰ Part Two, note 150 *supra*. Professor Simes thinks that such a conveyance can sometimes be construed to create a present estate in fee simple subject to a term. 1 *LAW OF FUTURE INTERESTS*, §150 (1936).

view that an executory interest limited to an ascertained living person and certain to become possessory on a fixed future date does not violate the Rule.¹⁷¹

With this exception, every executory interest which is not certain to become possessory, if at all, within the period of the Rule Against Perpetuities, is void.¹⁷² Thus an executory interest limited to a person who may not be ascertainable within the period of the Rule is invalid. If Andrew Baker bequeaths jewels to John Stiles for life, then to John's widow for life, then to the eldest son of John living at the death of such widow, the interest of the eldest son is void because he may not be ascertainable until the death of a person not presently in being.¹⁷³ Similarly, if Andrew Baker, owning an estate for five hundred years in land, bequeaths it to John Stiles for

¹⁷¹ Challis, *LAW OF REAL PROPERTY*, 3rd ed., 472-473 (1911); 2 Simes, *LAW OF FUTURE INTERESTS*, §498 (1936); *PROPERTY RESTATEMENT*, §370, *Comment h.* (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.20 (1952). See: *Gore v. Gore*, 2 P. Wms. 28, 24 Eng. Rep. 629 (1722); *Fearne, CONTINGENT REMAINDERS*, 10th ed., 1 (1844). But cf. Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§114, 201n.2 (1915). Compare the rule as to *interestia termini*, which are of the same essential nature as springing executory interests. Part Two, note 148 *supra*. An executory interest violates the Rule even though limited unconditionally to an ascertained living person on a fixed future day, if ascertainment of the exact interest in or part of the property so limited is postponed for longer than the period of the Rule. *Curtis v. Lukin*, 5 Beav. 147, 49 Eng. Rep. 533 (1842).

¹⁷² Part Two, note 134 *supra*. *PROPERTY RESTATEMENT*, §370, *Comment o.*, III. 5 (1944). An executory interest of a non-possessory character, such as a beneficial interest under a trust or a profit or easement, would, of course, vest when it becomes presently beneficial.

¹⁷³ *Hodson v. Ball*, 14 Sim. 558, 60 Eng. Rep. 474 (1845); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §214 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §496 (1936); *PROPERTY RESTATEMENT*, §370, *Comment k.* (1944); Part Two, note 131 *supra*. In *Re Hill*, [1902] 1 Ch. 807 (C.A.), an attempt to create a perpetual succession of life interests in jewels was held invalid. Compare Part Two, note 13 *supra*. In both the example put in the text and in *Re Hill*, the interests created would have been contingent remainders if the property involved had been land instead of jewels. Even so, they would have been void because no future interest can vest until the taker is ascertainable. Part Two, note 157 *supra*.

life, then to his eldest son for life, then to the eldest son of such eldest son, the last disposition is void if John has no son when Andrew dies, because the taker may not be ascertainable within lives in being and twenty-one years.¹⁷⁴ Even though the taker of an executory interest is in being and ascertained, it is invalid if so limited as to become possessory upon the happening of an event which may not occur and which may occur at a time beyond the period of the Rule Against Perpetuities. Thus if Andrew Baker conveys land to James Thorpe in fee simple, "but if the descendants of James become extinct, then to John Stiles and his heirs," the shifting executory interest limited to John is void because it might become possessory at some time beyond the period of the Rule.¹⁷⁵ Similarly, if Andrew Baker conveys land

¹⁷⁴ *Somerville v. Lethbridge*, 6 T.R. 213, 101 Eng. Rep. 517 (1795); *Beard v. Westcott*, 5 B.&Ald. 801, 106 Eng. Rep. 1383 (1822); *Beard v. Westcott*, Turn. & R. 25, 37 Eng. Rep. 1002 (1822). A freehold remainder limited in the same way would also be void.

¹⁷⁵ *Davies v. Speed*, 2 Salk. 675, 91 Eng. Rep. 574 (1692); Digby, HISTORY OF THE LAW OF REAL PROPERTY, 5th ed., 365-366 (1897); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §177 (1915). See: *Badger v. Lloyd*, 1 Salk. 232 at 233, 91 Eng. Rep. 206 (1696). That is, an executory interest limited to commence on indefinite failure of issue is void under the Rule although, as has been seen (Part Two, note 155 *supra*) a remainder on an estate tail, which is really conditional upon indefinite failure of issue, is vested and valid. In England, until the rule was changed by statute [1 Vict., c. 26, §29, (1837)] there was a constructional presumption that, when property was transferred "to James Thorpe and his heirs but, if James die without issue, to John Stiles and his heirs," the phrase "die without issue" meant indefinite failure of issue, that is "if the descendants of James ever become extinct." If the property involved was land, such a transfer was construed to create an estate tail in James with a remainder in fee simple in John which was vested and valid. *Soule v. Gerrard*, Cro. Eliz. 525, 78 Eng. Rep. 773 (1595); *Tuttlesham v. Roberts*, Cro. Jac. 22, 79 Eng. Rep. 18 (1603); *Browne v. Jerves*, Cro. Jac. 290, 79 Eng. Rep. 249 (1610); *Chadock v. Cowley*, Cro. Jac. 695, 79 Eng. Rep. 604 (1624); *Doe ex dem. Jones v. Owens*, 1 Barn. & Ad. 318, 109 Eng. Rep. 805 (1830). See: *Machell v. Weeding*, 8 Sim. 4, 59 Eng. Rep. 2 (1836). If the property involved consisted of chattels real or personal, the interest of John was an executory interest which was void under the Rule Against Perpetuities. *Green v. Rod*, Fitz-G. 68, 94 Eng. Rep. 656 (1732); *Beauclerk v. Dormer*, 2 Atk. 308, 26 Eng. Rep. 588 (1742).

to James Thorpe and his heirs so long as the Penobscot Building stands and then to John Stiles and his heirs, the shifting executory interest of John is invalid because it is not certain that the Penobscot Building will fall within lives in being and twenty-one years.¹⁷⁶

C. VESTING UNDER MICHIGAN LAW

Chapter 62 of the Michigan Revised Statutes of 1846,¹⁷⁷ which was adopted, with some modifications, from the New York Revised Statutes of 1829,¹⁷⁸ made extensive changes in the terminology and some changes in the nature and characteristics of future interests in land. The statutes denominate every interest which is expectant as to possession, created in a person other than

¹⁷⁶ Part Two, note 49 *supra*. Yet, where estates tail are permitted, a conveyance to James Thorpe and the heirs of his body so long as Westminster Hall stands, remainder to John Stiles and his heirs, would give John a valid vested remainder. Part Two, note 155 *supra*.

¹⁷⁷ Comp. Laws (1857); §2585 et seq.; Comp. Laws (1871) §4068 et seq.; Comp. Laws (1897) §8783 et seq.; How. Stat., §5517 et seq.; Comp. Laws (1915) §11519 et seq.; Comp. Laws (1929) §12921 et seq.; Mich. Stat. Ann., §26.1 et seq.; Comp. Laws (1948) c. 554.

¹⁷⁸ Part Two, Chapter I, Title 2, Art. 1. As to the drafting of the New York Revised Statutes and their partial adoption in Michigan, see Part One, *supra*, at notes 575, 582. The Michigan chapter has two sections which were not in the New York article, §45, which provides that the presumption created by §44, that a conveyance to two or more persons creates a tenancy in common, does not apply to mortgages or conveyances to husband and wife, and §46, relating to nominal conditions, which is quoted in Part One, *supra*, at note 143. Section 24 of the New York article provided: "Subject to the rules established in the preceding sections of this Article, a freehold estate as well as a chattel real, may be created, to commence at a future day; an estate for life may be created, in a term of years, and a remainder limited thereon; *a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Article.*" Section 24 of the Michigan chapter omitted the italicized portion of the New York section. The significance of this omission has been suggested in Part Two, note 49 *supra*, and will be discussed more fully in Part Three, *infra*.

the grantor or testator, a future estate¹⁷⁹ and classify some future estates as remainders but give no special name to those which are not remainders. The Statutes classify as remainders not only those freehold future interests which would have been remainders under English law but also future estates of freehold or for years so limited as to cut off a prior freehold estate, to cut off or follow an estate in fee simple, or to cut off or follow an estate for years.¹⁸⁰ Thus those interests which

¹⁷⁹ "Sec. 7. Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy.

"Sec. 8. An estate in possession, is where the owner has an immediate right to the possession of the land; an estate in expectancy is where the right to the possession is postponed to a future period.

"Sec. 9. Estates in expectancy are divided into,

"1. Estates commencing at a future day, denominated future estates: and,

"2. Reversions.

"Sec. 10. A future estate, is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time."

The Revisers' notes make it clear that the object of these provisions was to abolish the technical differences between remainders and executory interests. 3 N.Y. Rev. Stat., 2 ed., 570-571 (1836).

¹⁸⁰ "Sec. 11. When a future estate is dependent upon a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

"Sec. 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age.

"Sec. 20. A contingent remainder shall not be created on a term for years, unless the nature of the contingency upon which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof.

"Sec. 21. No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

"Sec. 23. All the provisions in this chapter contained relative to future estates, shall be construed to apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years, shall not be suspended for a longer period than the absolute power of alienation can be suspended, in respect to a fee.

"Sec. 27. A remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the

in England would have been remainders, shifting executory interests and present freeholds subject to a term are remainders here. One type of estate which would have been a springing executory interest in England, the freehold estate limited to cut off or follow a term of years only if an uncertain event occurs, is also a remainder under the Michigan statutes. Interests which in England would have been *interessia termini* or springing executory interests of other types are simply future estates, without specific name, in Michigan.

The statutes convert all estates tail into estates in fee simple¹⁸¹ and provide that a remainder in fee limited on an estate tail shall take effect if, but only if, the first tenant in tail dies without issue living at the time of his

precedent estate; and every such remainder shall be construed a conditional limitation, and shall have the same effect as such a limitation would have by law."

See also §24, quoted in Part Two, note 178 *supra*, and *In re Coots' Estate*, 253 Mich. 208 at 214, 234 N.W. 141 (1931). §§16, 20 and 23 were repealed by Act 38, P.A. 1949, Mich. Stat. Ann., §26.49 (2), Comp. Laws (1948) §554.52, but the repeal would not seem to alter the meaning of the term "remainder." For the much narrower meaning of the term "remainder" at common law see Part Two, *supra*, at notes 6-21, 148, 150.

¹⁸¹ §3, quoted in the text at Part One, note 84 *supra*. Under the Rule in *Shelley's Case* [*Wolfe v. Shelley*, 1 Co. Rep. 93b, 76 Eng. Rep. 206 (1579-81)], a conveyance "to John Stiles for life, remainder to his heirs," creates a fee simple in John and a conveyance "to John Stiles for life, remainder to the heirs of his body," creates a fee tail in John. Rev. Stat. 1846, c. 62, §28, abolishes that rule by providing, "When a remainder shall be limited to the heirs, or heirs of the body of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs, or heirs of the body of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them." The effect of §§3 and 28 combined is that a conveyance "to John Stiles for life, remainder to the heirs of his body," creates a life estate in John with contingent remainder in fee simple to the heirs of his body. *Thompson v. Thompson*, 330 Mich. 1, 46 N.W. (2d) 437 (1951), Part One, note 89 *supra*. As a remainder to the heirs of a living person is contingent (Part Two, note 158 *supra*), the abolition of the Rule in *Shelley's Case* has the effect of making some dispositions violate the Rule Against Perpetuities which would not have done so at common law.

death.¹⁸² Whereas in English law the rules as to vesting of remainders and executory interests were different in several respects, our statutes provide a uniform rule as to the vesting of all future estates in land:

"Sec. 13. Future estates are either vested or contingent:

"They are vested when there is a person in being who would have an immediate right to possession of the lands, upon the ceasing of the intermediate or precedent estate:

"They are contingent whilst the person to whom or the event upon which they are limited to take effect remains uncertain."

Because the common-law recognition of remainders was restricted to freehold interests in land, it seemed, at the time when English law was received in this country, that all future interests in chattels real and personal, except *interessia termini*, were executory interests and so could not vest before they became possessory.¹⁸³ Chap-

¹⁸² §4, quoted in the text at Part One, note 84 *supra*. Sec. 22 provides: "When a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the word 'heirs' or 'issue', shall be construed to mean heirs or issue living at the death of the person named as ancestor." Compare the different construction of such provisions in the older English decisions. Part Two, note 175 *supra*. By eliminating the "indefinite failure of issue" construction, Section 22 saves many future estates which would otherwise violate the Rule Against Perpetuities. Revisers' Note, 3 N.Y. Rev. Stat., 2d ed., 568 (1836). It was applied in *Goodell v. Hibbard*, 32 Mich. 47 (1875); *Mullreed v. Clark*, 110 Mich. 229, 68 N.W. 138, 989 (1896). In *St. Amour v. Rivard*, 2 Mich. 294 (1852), a will which became effective before the Revised Statutes of 1846 came into force devised life estates to named persons and successive estates for life to their descendants "as long as any posterity will exist, and in case of extinction to the next heirs." The ultimate remainder was held void under the common-law Rule Against Perpetuities.

¹⁸³ Part One, notes 403-422, Part Two, notes 166, 167, *supra*. However, modern English and American law tends to treat future interests in chattels personal, limited to follow life interests, as remainders, at least for purposes of the Rule Against Perpetuities. *Evans v. Walker*,

ter 62 of the Michigan Revised Statutes of 1846 makes possible remainders in chattels real and applies the same rules of vesting to future estates in chattels real as to future freehold estates. The chapter did not apply to chattels personal, but the Michigan Supreme Court has shown a tendency to recognize future interests in chattels personal, including remainders, which correspond to those permitted in land. Many of the vesting cases discussed in this section involved future interests in chattels personal and some involved mixed dispositions of land and chattels. In all of them the Court applied the same rules of vesting to future interests in chattels personal as to future interests in land, and in several instances it has expressly stated that the rules of vesting are the same as to both.¹⁸⁴ What the statutes have done for future interests in chattels real, case law has done

[1876] 3 Ch. Div. 211; Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§841, 851 (1915); Part One, notes 429, 430, *supra*.

¹⁸⁴ *Toms v. Williams*, 41 Mich. 552 at 556, 2 N.W. 814 (1879); *In re Coots' Estate*, 253 Mich. 208 at 214, 234 N.W. 141 (1931). Cf. *Wessborg v. Merrill*, 195 Mich. 556 at 568-569, 162 N.W. 102 (1917). The Rule Against Perpetuities did not apply to dispositions of Michigan land between 1847 and 1949 (Part Two, note 50 *supra*), but decisions establishing the rules of vesting of interests in land made during this period, although not involving application of the Rule, should be considered authoritative as to the problem of vesting for purposes of the Rule. The Michigan vesting cases are discussed in detail in Brake, "The 'Vested vs. Contingent' Approach to Future Interests: A Critical Analysis of the Michigan Cases," 9 *UNIV. OF DETROIT L.J.* 61, 121, 179 (1946). The original title of Chapter 62 of the Revised Statutes of 1846 (Part Two, note 177 *supra*) was, "Of the Nature and Qualities of Estates in Real Property, and the Alienation Thereof." It was the first chapter in Title XIV, which was headed, "Of Real Property, and of the Nature, Qualities and Alienation of Estates Therein." Act 227, P.A. 1949, amended the title of Chapter 62 to read, "Of the nature and qualities of estates in real and personal property, and the alienation thereof." It could be argued that this amendment extended Section 13 and other provisions of the chapter to chattels personal. However, Act 227 did not amend the heading of Title XIV or remove the limiting word "lands" from Sections 1, 8, 13, 36, 44, and 46. The primary purpose of Act 227 was to extend Sections 37, 38, 39 and 40, relating to accumulations, to personal property. Part Two, note 501 *infra*. It is doubtful that it changed the scope of other sections of Chapter 62.

for chattels personal. We have one system of future interests in all types of property with uniform rules of vesting for all.

Section 13 is a paraphrase of Sir William Blackstone's explanation of the distinction between vested and contingent remainders.¹⁸⁵ Although neither complete nor accurate for that purpose, the section was probably intended to adopt the English rules governing the vesting of remainders and apply them to all future estates. In at least one situation, however, the section, when read with other provisions of Chapter 62, appears to change the rules governing the vesting of remainders. At common law a remainder failed if it was not ready to take effect when the preceding estate terminated.¹⁸⁶ Hence a remainder limited to commence on an event which might not occur at or before the termination of the preceding estate was contingent even though the event was one certain to occur, such as the coming of a fixed date or the death of a living person.¹⁸⁷ If Andrew Baker conveys lands to James Thorpe for life, remainder to John Stiles and his heirs if Lucy Baker dies either before or after James, the remainder is contingent at common law. Lucy will certainly die but not necessarily before James' life estate terminates. Our statutes provide that a remainder does not fail merely because it is not ready

¹⁸⁵ "For remainders are either *vested* or *contingent*. *Vested* remainders (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain in a determinate person, after the particular estate is spent. . . . Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect." 2 COMMENTARIES *168-169 (1765), citing *Boraston's Case*, 3 Co. Rep. 16a, 20a, 76 Eng. Rep. 664, 670 (1587).

¹⁸⁶ Part Two, notes 11, 12, *supra*.

¹⁸⁷ Part Two, note 151 *supra*.

to take effect when the preceding estate terminates,¹⁸⁸ hence the remainder of John is certain to take effect upon an event certain to occur. If James should die before Lucy, the right to possession for the life of Lucy would revert to Andrew. If the reversionary estate of Andrew is an "intermediate or precedent estate" within the meaning of the second clause of Section 13, John's interest comes within the statutory definition of a vested future estate. If the phrase "intermediate or precedent estate" in the second clause does not include reversionary estates, John's interest does not come within either the second or third clause. The first clause provides that future estates are either vested or contingent. John's interest is not contingent under either the common-law definition of contingency or that provided by the third clause of Section 13 because there is no uncertainty as to the person who takes or the event upon which the interest takes effect, so his interest is probably a vested future estate in Michigan.¹⁸⁹

¹⁸⁸ "Sec. 32. No expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseizin, forfeiture, surrender, merger or otherwise.

"Sec. 33. The last preceding section shall not be construed to prevent an expectant estate from being defeated in any manner, or by any act or means which the party creating such estate shall, in the creation thereof, have provided or authorized; nor shall an expectant estate thus liable to be defeated, be on that ground adjudged void in its creation.

"Sec. 34. No remainder, valid in its creation, shall be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder is limited to take effect; but should such contingency afterwards happen, the remainder shall take effect in the same manner, and to the same extent, as if the precedent estate had continued to the same period."

¹⁸⁹ Walsh, *FUTURE ESTATES IN NEW YORK*, §7 (1931). This conclusion seems inescapable in view of the language of Section 29: "When a remainder on an estate for life, or for years, shall not be limited on a contingency, defeating or avoiding such precedent estate, it shall be construed as intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years."

It will be recalled that, under English law, a remainder may be vested although it is not presently possessory, even when it may never become possessory,¹⁹⁰ but an executory interest does not vest until it becomes possessory.¹⁹¹ It is clear that in Michigan a remainder may vest before it becomes possessory,¹⁹² even when it may never become possessory. Thus if Andrew Baker conveys land to Roger White for life, remainder to John Stiles for life, John's remainder is vested although it will not become possessory if he does not survive Roger.¹⁹³ As Section 13 adopts one standard of vesting for all future estates, the standard applicable to remainders in English law, it would seem that a future estate may be vested in Michigan before it becomes possessory even though it would have been an executory interest in England. The language of the second clause of Section 13 makes this clear as to those types of remainders which would have been shifting executory interests under English law. As to those future interests which would have been springing executory interests, a problem like that discussed in the preceding paragraph arises. If the phrase "intermediate or precedent estate"

Under the common-law rules, this section would make every remainder limited on an indefeasible estate for life or years contingent because it would not be ready to take effect whenever and however the preceding estate terminated. It is apparent that the statutes change the common-law rules of vesting in this respect.

¹⁹⁰ Part Two, notes 153-155, *supra*.

¹⁹¹ Part Two, notes 168, 169, *supra*. But such an interest may not be contingent.

¹⁹² *Mandlebaum v. McDonell*, 29 Mich. 78 (1874); *Hovey v. Nellis*, 98 Mich. 374, 57 N.W. 255 (1894); *Downing v. Birney*, 117 Mich. 675, 76 N.W. 125 (1898); *Rodey v. Stotz*, 280 Mich. 90, 273 N.W. 404 (1937). See: *Walton v. Torrey*, Harr. Ch. 259 (Mich. circa 1840); *Chambers v. Shaw*, 52 Mich. 18, 17 N.W. 223 (1883); *Hull v. Osborn*, 151 Mich. 8, 113 N.W. 784 (1908); *Wessborg v. Merrill*, 195 Mich. 556, 162 N.W. 102 (1917); *In re De Bancourt's Estate*, 279 Mich. 518, 272 N.W. 891 (1937).

¹⁹³ *Case v. Green*, 78 Mich. 540, 44 N.W. 578 (1889); *Downing v. Birney*, 117 Mich. 675, 76 N.W. 125 (1898).

in the second clause includes the retained interest of a grantor who has conveyed a future estate of the springing use type, then such a future estate is within the statutory definition of a vested interest if limited to commence upon an event certain to occur. If the phrase does not include such retained interests, such a future estate does not come within either the second or third clause but, since it is not contingent, must be vested under the language of the first clause. In any event, the Michigan Supreme Court has held that a future estate of the springing executory interest type, limited to commence upon the death of a living person, is vested. Thus in *McIntyre v. McIntyre's Estate*,¹⁹⁴ involving a conveyance of an estate to commence on the death of the grantors, the Court said,

"Two provisions of the deed were relied on to sustain proponent's contention that the terms of the deed were not sufficient to create a vested interest in a grantee: (a) 'It is understood that this deed is made for the purpose of creating a future estate;' (b) 'and the full title and enjoyment * * * shall only become operative upon

¹⁹⁴ 156 Mich. 240 at 241-242, 120 N.W. 587 (1909). The real problem involved in the case was not vesting but whether the instrument was a will or a present conveyance of a future estate. If, as the Court held, it was a present conveyance of a future estate, that estate would have been a springing executory interest under English law. Part Two, notes 6, 150, 162, 169, *supra*. In *Engel v. Ladewig*, 153 Mich. 8, 116 N.W. 550 (1908), a husband and wife joined in a deed conveying land owned by the husband in fee simple to their son in fee simple, subject to certain charges and reserving to the grantors "all right, title and control so long as we or either of us shall live." The Court treated the interest of the son, which would have been a springing executory interest in England, exactly as if it were a vested remainder. See: *Hitchcock v. Simpkins*, 99 Mich. 198, 58 N.W. 47 (1894); *Taylor v. Richards*, 153 Mich. 667, 117 N.W. 208 (1908); *Watkins v. Minor*, 214 Mich. 308, 183 N.W. 186 (1921); *Benton Harbor Federation of Women's Clubs v. Nelson*, 301 Mich. 465, 3 N.W. (2d) 844 (1942); Rev. Stat. 1846, c. 62, §24, quoted in Part Two, note 178 *supra*; Revisers' note, 3 N.Y. Rev. Stat., 2d ed., 570-571 (1836).

the death of the survivor of the grantors hereof, and at that time, and not before, the said grantee shall enjoy the full title and control hereof.' Our statute * * * defines 'a future estate' as 'an estate limited to commence in possession at a future day,' etc., and by [Section 13] they are said to be either vested or contingent. There is no contingency mentioned in this deed. The grantee's right to possession was inevitable on the happening of events which were inevitable. He had, therefore, a vested interest."

If a future estate of the springing executory interest type, limited to commence unconditionally on the death of a living person, is vested, it would seem that such an estate limited to commence unconditionally on a fixed future date is likewise vested. In other words, mere postponement of enjoyment to a future time does not make a future estate contingent and so, under Section 13, does not keep it from being vested, although it would have been an executory interest in England. If Andrew Baker conveys to John Stiles an estate in fee simple in land to commence in possession twenty-two years after the date of the deed, John probably takes a vested estate which does not violate the Rule Against Perpetuities.¹⁹⁵

Under English law, the fact that an interest prior in time is on special limitation does not make a future interest contingent, provided it is limited to take effect whenever and however the prior interest terminates. If Andrew Baker devises land to Lucy Baker until her death or remarriage, remainder to John Stiles and his heirs, John takes a vested remainder at common law.¹⁹⁶ If Andrew Baker conveys land to James Thorpe for

¹⁹⁵ In *Hibler v. Hibler*, 104 Mich. 274, 62 N.W. 361 (1895), there was a bequest to be paid a year after the death of the testator's widow. It was treated as vested. Walsh, *FUTURE ESTATES IN NEW YORK*, §7 (1931). Cf. Part Two, note 171 *supra*.

¹⁹⁶ Part Two, note 154 *supra*.

forty years if the Penobscot Building so long stands, remainder to John Stiles and his heirs, John takes a present vested estate in fee simple at common law.¹⁹⁷ The Michigan statutes make the interest of John in the second example a future estate instead of a present interest, and Section 13 provides that future estates are contingent "whilst - - - the event upon which they are limited to take effect remains uncertain." It is arguable that the section makes the interests of John in these examples contingent and, hence, that that in the second example is void because the event may remain uncertain for more than twenty-one years. However, the "event" in each of these examples is not a condition precedent to John's taking an interest but only one which, if it occurs, will terminate the preceding estate and so make his interest possessory sooner. At any rate, the Michigan Supreme Court has held that a remainder of the type described in the first example is vested,¹⁹⁸ so it would probably hold that one of the type described in the second example is vested and valid.

(1) Contingency as to Person or Event

Under English law a future interest limited to persons not in being or not presently ascertainable or upon a condition precedent not certain to occur is contingent.¹⁹⁹ Hence a remainder limited to the heirs of a living person is contingent because they cannot be ascertained until the death of the ancestor.²⁰⁰ Dicta in New

¹⁹⁷ Part Two, note 150 *supra*.

¹⁹⁸ *Mandlebaum v. McDonell*, 29 Mich. 78 (1874); *Rood v. Hovey*, 50 Mich. 395, 15 N.W. 525 (1883). See: *Ryder v. Flanders*, 30 Mich. 336 (1874); *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924).

¹⁹⁹ Part Two, notes 151, 159, 173, 175, 176, *supra*.

²⁰⁰ Part Two, note 158 *supra*.

York cases decided in 1835 and 1840 suggested that the second clause of Section 13 may have made a radical change in the rules of vesting by providing that a remainder is vested if there is a person in being who would be entitled to take if the preceding estate terminated *now*.²⁰¹ In *Moore v. Littel*,²⁰² decided in 1869, land had been conveyed to John Jackson "for and during his natural life, and after his death to his heirs and their assigns forever." Although unnecessary to the decision,²⁰³ the opinion of Judge Woodruff, in which a majority of the Court of Appeals concurred, stated that the remainder vested presently in the living children of John as his heirs apparent and contained the following dicta:

"If there 'is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate, then that remainder is vested' within the terms of the statute. It is not 'a person who *now has* a present fixed right of future possession or enjoyment', but a person who would have an immediate right if the precedent estate were now to cease. I read this language according to its ordinary and natural signification, and if you can point to a human being and

²⁰¹ *Coster v. Lorillard*, 14 Wend. 265 at 301-302 (1835); *Moore v. Lyons*, 25 Wend. 119 at 144 (1840). In the latter case Chancellor Walworth qualified this startling proposition by a suggestion that it was true only if the preceding estate would be terminated by an event certain to occur. See also *Lawrence v. Bayard*, 7 Paige 70 at 75 (N.Y. 1838).

²⁰² 41 N.Y. 66 (1869). It is evident from his opinion (pp. 71-75) that Judge Woodruff misunderstood the common-law rules of vesting. He seems to have thought that such a remainder was contingent at common law only because of the doctrine of destructibility of contingent remainders. The context indicates that Judge Woodruff did not consider the remainder indefeasibly vested; it would open to admit after-born children and be defeated, as to any child, if he predeceased his father.

²⁰³ The only question involved was whether children of John could alienate their interests before their father's death. Six of the seven judges agreed that the remainder was alienable even if contingent in view of Section 35 (Part One, note 371 *supra*.)

say as to him, 'that man or that woman, by virtue of a grant of a remainder, would have an immediate right to the possession of certain lands if the precedent estate of another therein should now cease', then the statute says, he or she has a vested remainder. - - -

"That definition [the third clause] is to be construed in connection with the other [the second clause]; if there is no person who would have an immediate right of possession upon the ceasing of the intermediate or precedent estate, *i.e.*, if no person can be found of whom this can now be avowed, either because if that precedent estate should now cease, it would be uncertain who was entitled, or whether the event upon which it was limited would happen, then the remainder is contingent." ²⁰⁴

If pushed to their logical conclusion these dicta would seem to mean that if Andrew Baker conveyed land to James Thorpe and his heirs "until his last descendant dies" or "until the Penobscot Building falls," then to John Stiles and his heirs, the interest of John Stiles would be vested. The Revisers' Notes make it clear that this was not intended.²⁰⁵ Even if confined to the facts of *Moore v. Littel*, a remainder to the heirs of a life tenant, the dicta are unsound. They engraft onto the second clause of Section 13 the words "if the precedent estate should *now* cease." When read in the light of the common law, that clause means that a remainder is vested if an ascertained living person would take on the termination of the preceding estate *whenever* it terminates. Moreover, it seems evident that the second clause is qualified by the third rather than qualifying it. When the three clauses are read together, the result is a short statement of the common-law rules of vesting of re-

²⁰⁴ 41 N.Y. 66 at 76, 79.

²⁰⁵ 3 N.Y. Rev. Stat., 2d ed., 568-569 (1836).

mainders.²⁰⁶ However that may be, the dicta in *Moore v. Littel* have caused much confusion in New York and other states which have adopted the New York statutes.²⁰⁷

In the New York version of Section 13, the clauses are separated by periods.²⁰⁸ In the Michigan version they are separated by colons.²⁰⁹ Judge Sanford M. Green, who drafted the Michigan Revised Statutes of 1846, had been a New York lawyer²¹⁰ and must have been familiar with the doubt in New York as to the meaning of Section 13. It may be that he introduced this change in punctuation deliberately to make it clear that the second clause was qualified by the third. In any event, the confusion in the New York cases necessitates a careful examination of the Michigan cases which involve the problem in *Moore v. Littel*.

As to the specific problem involved in *Moore v. Littel*, the Michigan Supreme Court has shown a disposition to construe the word "heirs" in a conveyance of a remainder to the heirs of a living person as meaning "children" or "issue."²¹¹ If the word is construed to mean

²⁰⁶ Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§571-582 (1928); Walsh, *FUTURE ESTATES IN NEW YORK*, §8 (1931). As Mr. Chaplin points out, the Revisers' Notes expressly state that a remainder to the issue of a life tenant living at his death is contingent. 3 N.Y. Rev. Stat., 2d ed., 573 (1836). See Part Two, note 185 *supra*.

²⁰⁷ *Id.*; Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §107 (1915); 1 Simes, *LAW OF FUTURE INTERESTS*, §§83-92 (1936).

²⁰⁸ 1 N.Y. Rev. Stat., 2d ed., 718 (1836).

²⁰⁹ Rev. Stat. 1846, c. 62, §13, Part Two, note 184 *supra*. In Comp. Laws (1857) §2597, Comp. Laws (1871) §4080, Comp. Laws (1897) §8795 and Comp. Laws (1915) §11531, there is a colon after the first clause and a semicolon after the second. In How. Stat., §§5529, there are semicolons after both. In Comp. Laws (1929) §12933, Mich. Stats. Ann., §26.13, and Comp. Laws (1948), §554.13, there is a colon after the first clause and a period after the second. The punctuation of the original Revised Statutes of 1846 should prevail.

²¹⁰ Part One, note 582 *supra*.

²¹¹ See *v. Derr*, 57 Mich. 369, 24 N.W. 108 (1885); *Porter v. Osmun*, 135 Mich. 361, 97 N.W. 756 (1904); *Fullager v. Stockdale*, 138 Mich.

"children," the remainder vests in the living children of the named ancestor, subject to open to admit after born children.²¹² When, however, the word "heirs" in a conveyance of a remainder to the heirs of a living person is construed in its technical sense, that is, as meaning the persons who would inherit the lands of the ancestor on his death intestate, Michigan rejects the view of Judge Woodruff in *Moore v. Littel* and follows the common-law rule that a remainder to the heirs of a living person is contingent until his death. *In re Churchill's Estate*²¹³ involved a devise to a trustee for the life of the testator's daughter, remainder, if the daughter should die leaving issue, to such issue, and, if she should die without issue, remainder, as to eight-tenths, to named persons. The will provided, "This leaves an undivided two-tenths part of the remainder of my estate, to be disposed of under the laws of the State of Michigan." The Court held that the two-tenths remained contingent until the death of the daughter without issue and then vested in the heirs of the testator, determined as of the death of the daughter. *Thompson v. Thompson*²¹⁴ involved a conveyance to a son, "For and during his natural lifetime and after his decease, to the heirs of his body." The trial court, evidently following the dicta in *Moore v. Littel*, held that the son took a life estate with

363, 101 N.W. 576 (1904). In all these cases the life tenant, to whose "heirs" the remainder was limited, had living children at the date of the conveyance. Cf. *Goodell v. Hibbard*, 32 Mich. 47 (1875).

²¹² See *v. Derr*, 57 Mich. 369, 24 N.W. 108 (1885). But see: *Fullager v. Stockdale*, 138 Mich. 363 (1904). This was the common-law view. Part Two, note 158 *supra*.

²¹³ 230 Mich. 148, 203 N.W. 118 (1925). See: *Lewis v. Nelson*, 4 Mich. 630 (1857).

²¹⁴ 330 Mich. 1, 46 N.W. (2d) 437 (1951); Part One, note 89, Part Two, note 181, *supra*. Cf. *Wilson v. Terry*, 130 Mich. 73, 89 N.W. 566 (1902). In *Menard v. Campbell*, 180 Mich. 583, 147 N.W. 556 (1914), land was devised to a son for life, remainder to his heirs. It was held that the son's widow took a share as a statutory heir.

a vested remainder to the heirs of his body in being at the date of the deed, subject to open to admit after-born heirs. The Supreme Court modified the decree to hold that the son took a life estate with a remainder to the heirs of his body in being at his death. The opinion clearly adopts the technical common-law meaning of "heirs" and appears to accept the common-law view that a remainder limited to the heirs of a living person is contingent.

The dicta in *Moore v. Littel*²¹⁵ go far beyond the specific problem involved in that case by stating that a remainder is vested if there is a person in being who would take it if the preceding estate terminated *now*. In *McInerny v. Haase*²¹⁶ the Michigan Supreme Court showed some inclination to adopt this view. In that case, land was devised to the testator's wife for life, "and upon her death I bequeath to my daughter Hannah and finally, upon Hannah's death, to my granddaughter, Mary Jane McInerny, should she survive her mother Hannah. And in case the said Mary Jane dies before her mother, Hannah, then it is my will that the afore-said property be equally divided among the surviving children of my daughter Hannah." The Court said that the question of whether the will violated the statute prohibiting suspension of the absolute power of alienation,

"depends upon whether the estate in remainder was vested or contingent. Our statute (section 8795, 3 Comp. Laws) defines such estates:

" 'Future estates are either vested or contingent: They are vested when there is a person in being who would have an immediate right to the possession of the lands,

²¹⁵ Part Two, notes 202-204, *supra*.

²¹⁶ 163 Mich. 364, 128 N.W. 215 (1910). Accord: *Ensign v. Dunn*, 181 Mich. 456, 148 N.W. 343 (1914).

upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom or the event upon which they are limited to take effect, remains uncertain.' ²¹⁷

"We find in the instant case, under this definition, that at the creation of this estate this granddaughter was such person then in being who would have such immediate right to possession. The conclusion is unavoidable that this was a vested remainder. See opinion, authorities, and notes on the distinction between vested and contingent remainders. *Kountz's Estate*, 213 Pa. 390 (62 Atl. 1103, 3 L.R.A. [N.S.] 639, 5 Am. & Eng. Ann. Cas. 427." ²¹⁸

The report of the cited Pennsylvania case is preceded by a headnote reading:

"A vested remainder is an estate to take effect after another estate, for years, for life, or in tail, which is so limited that if the particular estate were to expire or end in any way *at the present time*, some certain person would become thereupon entitled to the immediate enjoyment." ²¹⁹

²¹⁷ The punctuation does not agree with *Comp. Laws* (1897) §8795, in which the second clause is followed by a semicolon. Part Two, note 209 *supra*.

²¹⁸ 163 Mich. 364 at 368. The question involved was whether these dispositions, plus a provision requiring the then holder of the land to pay \$5 to testator's son if he returned from the Army, suspended the absolute power of alienation for more than two lives. It is difficult to see why the court thought the vested or contingent character of Mary Jane's remainder was material. It would either vest subject to the \$5 charge or fail on the deaths of her grandmother and mother. In *Rood v. Hovey*, 50 Mich. 395, 15 N.W. 525 (1883) there was a devise to testator's wife for life or widowhood, remainder "to my children now living, or who may be at the time of her decease or marriage." It was held that the remainder vested indefeasibly in the children living at the testator's death. This is probably just an illustration of the tendency to construe ambiguous or inconsistent language in favor of early vesting. *Cf. Lewis v. Nelson*, 4 Mich. 630 (1857), holding that a remainder to the surviving children of the grantors created by a deed executed before the effective date of the Revised Statutes of 1846 conveyed no interest to their living children, present or future.

²¹⁹ Emphasis supplied.

This headnote appears to express the view of Judge Woodruff in *Moore v. Littel*, but the Pennsylvania opinion quotes from numerous English authorities and clearly asserts the common-law view in the following passage:

"But, in any event, the remainder in the grandchildren could only be deemed vested in case they had the right to immediate possession *whenever and however* the preceding estate determined." ²²⁰

This being so, it would seem that the opinion in *McInerny v. Haase* does not really adopt the theory of the dicta in *Moore v. Littel*. It should probably be classified as an illustration of the judicial tendency to construe as a condition subsequent language which on its face imposes a condition precedent. However that may be, the other Michigan cases involving the question clearly reject the *Moore v. Littel* view and adopt the common-law rules of vesting of remainders. *Fitzhugh v. Townsend* ²²¹ involved a devise to a trustee for the life of testatrix's granddaughter,

"and if, at her decease, she leave lawful issue surviving her, I devise and bequeath the whole of my said residuary estate to such issue.

"In the event of the death of my granddaughter, Elizabeth Fitzhugh Birney, without lawful issue surviving her, - - - I further will and direct that all the rest, residue, and remainder - - - be equally divided among all my brothers and sisters, and the children of such of them as shall be no longer living, - - -."

Elizabeth died without ever having had issue. A

²²⁰ 213 Pa. 390 at 396, 62 Atl. 1103 (1906). Emphasis supplied. The case held that an interest limited to grandchildren to be ascertained ten years after the testatrix's youngest grandchild came of age was contingent and violated the Rule Against Perpetuities.

²²¹ 59 Mich. 427, 27 N.W. 561 (1886).

brother of the testatrix, Samuel, predeceased the testatrix, survived by a son, William, who survived the testatrix but died in the lifetime of Elizabeth, without issue, devising his estate to Townsend. The interest of William would not be vested under the English concept of vesting because it would be contingent on an event uncertain to occur, the death of Elizabeth without issue. Counsel for Townsend contended that a share vested in William at the death of the testatrix because, if the life interest of Elizabeth had then terminated, William would have taken a share, citing *Moore v. Littel* and other New York cases following the dicta of Judge Woodruff in support of this contention.²²² The Court affirmed a decree of Circuit Judge Sanford M. Green ruling that Townsend took nothing and held that William's remainder was contingent until the death of Elizabeth. As the same result could have been reached by holding that the interest of William vested at the death of the testatrix, subject to being divested if he predeceased Elizabeth, the Court's care in holding that William's remainder was contingent must be interpreted as a categorical rejection of the dicta in *Moore v. Littel* and a deliberate adherence to the common-law rules governing the vesting of remainders.

*Hadley v. Henderson*²²³ involved a will which devised the residue to Charles C. Owen and provided, "If in

²²² Briefs and Records, January Term, 1886, Defendant Townsend's Brief, pp. 11-15. His counsel was Charles I. Walker, Professor of Law in the University of Michigan. The Briefs and Records contain no opinion by Judge Green and the Bay County Clerk, who searched his records at the author's request, could find none.

²²³ 214 Mich. 157, 183 N.W. 75 (1921). Accord: *Stevens v. Wildey*, 281 Mich. 377, 275 N.W. 179 (1937). Cf. *In re Churchill's Estate*, 230 Mich. 148, 203 N.W. 118 (1925); Part Two, note 213 *supra*; *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N.W. 703 (1930), Part Two, notes 103, 145, *supra*; *In re Dingler's Estate*, 319 Mich. 189, 29 N.W. (2d) 108 (1947).

case Charles C. Owen dies without issue, it is my will that the above property be disposed of" to three named persons and a society. The Court, relying on *Fitzhugh v. Townsend* and stressing the third clause of Section 13, held the remainder contingent. In *Michigan Trust Co. v. Baker*,²²⁴ property was bequeathed to testatrix's husband until death or remarriage, remainder to a trustee for the life of her son Stuart and "If my said son shall have lawful child or children of his body who shall survive him, his share of my estate shall go to such child or children, girls at age of 25 years and boys at 30 years and not before." The will limited other remainders in the event that Stuart died without issue. Stuart died two years after the testatrix, without ever having had issue. The Court held all the remainders subsequent to the trust contingent and void under the Rule Against Perpetuities. In *Lambertson v. Case*,²²⁵ land was devised to testator's wife "as long as she lives, and when she gets through with it it shall go to Norma Lambertson if she is living, if not to J. V. Lambertson." It was held that the remainder of Norma was contingent. *In re Coots' Estate*²²⁶ involved a devise of land and other property to a trustee for the lives of the testator's widow and son, then to the son's children, or their heirs by right of representation, and in case the son should die without leaving issue or lineal heirs, then to six named nephews and nieces. The remainder to the nephews and nieces was held to be contingent. In *Floyd v. Smith*²²⁷ there was a bequest to a trustee for the lives of four named persons,

²²⁴226 Mich. 72, 196 N.W. 976 (1924), Part Two, notes 102, 128, *supra*. Accord: *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934), Part Two, notes 88, 104, *supra*.

²²⁵245 Mich. 208, 222 N.W. 182 (1928).

²²⁶253 Mich. 208, 234 N.W. 141 (1931), *cert. den.*, *Delbridge v. Oldfield*, 284 U.S. 665 (1931).

²²⁷303 Mich. 137, 5 N.W. (2d) 695 (1942), Part Two, note 98 *supra*.

then to the issue of the life beneficiaries living at the death of the survivor. It was held that the remainder vested on the death of the survivor of the life beneficiaries.

This review of the cases would seem to make it abundantly clear that Michigan does not accept the view advanced by Judge Woodruff in *Moore v. Littel* that a remainder is vested if there is a person in being who would take if the preceding estate terminated *now*. In Michigan a remainder is not vested unless the event upon which it is to become possessory is certain to occur and there are ascertained persons in being who, throughout the continuance of the remainder, will take *whenever* that event occurs. In the language of Section 13, a future estate is contingent whilst the person to whom or the event upon which it is limited to take effect remains uncertain.

(2) What Language Creates Contingency

As has been seen, a future interest may be vested although possession or enjoyment is postponed until a future time,²²⁸ although it may never become possessory because it may terminate before prior interests,²²⁹ and although it is subject to defeasance by the exercise of a power of appointment or by the operation of a condition subsequent, a special limitation, or an executory limitation.²³⁰ If Andrew Baker devises land to James Thorpe for life, remainder to Lucy Baker for life, but

²²⁸ Part Two, notes 153, 155, 195, *supra*. Otherwise there could be no such thing as a vested future interest. By definition a future estate is one "where the right to the possession is postponed to a future period." Part Two, note 179 *supra*.

²²⁹ Part Two, notes 154, 193, *supra*.

²³⁰ Part Two, note 160 *supra*. Cf. *Plant v. Weeks*, 39 Mich. 117 (1878).

if Lucy remarry, to John Stiles for the life of Lucy, the remainder of Lucy is vested although it will not become possessory in any event until the termination of James's life estate, it will never become possessory if Lucy dies before James and, even after it becomes possessory, it will be defeated if Lucy remarries. On the other hand, if Andrew Baker devises land to James Thorpe for life, remainder, if Lucy is unmarried at the death of James, to Lucy Baker for life, Lucy's remainder is contingent. When a future interest is limited to an ascertained living person it is contingent only if subject to a condition precedent of an uncertain event. In *Michigan State Bank v. Hastings*,²³¹ land and other property were conveyed to the State, "upon and subject to the express condition that the State of Michigan shall indemnify and save harmless" the grantors against a certain mortgage. In holding that this was a condition subsequent, the Court remarked,

"The right to annex a condition to a conveyance, results from the power of alienation; and this power of alienation is an incident to the right of property. If then, that condition be precedent, and the act upon which the estate depends be not performed, the estate does not vest; but if the condition be subsequent, the estate does vest, and will continue to vest until defeated by a failure on the part of the grantee to perform the condition annexed to the estate; or, in other words, until there is a breach of the condition."²³²

It should be noted that a future interest may be vested subject to defeasance although the event causing de-

²³¹ 1 Dougl. 225 (Mich. 1844). *Blanchard v. Detroit, Lansing & Lake Michigan R.R. Co.*, 31 Mich. 43 (1875), is a similar case. There a conveyance was made "upon the express condition" that the grantee build a depot on the land and stop a train there daily. This was held to be a condition subsequent.

²³² 1 Dougl. 225 at 252.

feasance may or will occur before the future interest becomes possessory. For example, if Andrew Baker devises land to Lucy Baker for life, remainder as she may by will appoint, and in default of appointment to John Stiles and his heirs, the remainder of John Stiles is vested subject to defeasance.²³³ In *McCarty v. Fish*,²³⁴ property was devised to testatrix's husband for life, with power to use so much of the principal as might be necessary in defraying his necessary expenses, remainder to others. It was held that the remainder vested at the death of the testatrix, subject to being defeated by the exercise of the power.

Whether particular language of a conveyance or will mentioning an uncertain event imposes a condition precedent or merely postpones enjoyment, limits the duration of the interest, or subjects it to defeasance is usually a problem of construction. The Michigan Supreme Court has frequently expressed a strong constructional preference for that construction which will make the future interest vest at the earliest possible time.²³⁵ An interest which is vested or will certainly vest during the period of the Rule does not, of course, violate the Rule Against Perpetuities.

²³³ Part Two, note 160 *supra*. It is also possible to have a remainder vested subject to a charge. *Smith v. Jackman*, 115 Mich. 192, 73 N.W. 228 (1897); *Engel v. Ladewig*, 153 Mich. 8, 116 N.W. 550 (1908).

²³⁴ 87 Mich. 48, 49 N.W. 513 (1891).

²³⁵ *Toms v. Williams*, 41 Mich. 552 at 565, 2 N.W. 814 (1879); *Rood v. Hovey*, 50 Mich. 395 at 399-400, 15 N.W. 525 (1883); *Union Mutual Association v. Montgomery*, 70 Mich. 587 at 595, 38 N.W. 588 (1888); *Hovey v. Nellis*, 98 Mich. 374 at 378, 57 N.W. 255 (1894); *Van Gallow v. Brandt*, 168 Mich. 642 at 648-649, 134 N.W. 1018 (1912); *Ensign v. Dunn*, 181 Mich. 456 at 462, 148 N.W. 343 (1914); *In re Churchill's Estate*, 230 Mich. 148 at 155, 157, 203 N.W. 118 (1925); *Lambertson v. Case*, 245 Mich. 208 at 210, 222 N.W. 182 (1928); *In re East's Estate*, 325 Mich. 352 at 360, 38 N.W. (2d) 889 (1949); *In re Ecclestone's Estate*, 339 Mich. 15 at 20, 62 N.W. (2d) 606 (1954). This is a rule of construction generally accepted in Anglo-American law. 2 Simes, *LAW OF FUTURE INTERESTS*, §348 (1936).

The uncertain events which most commonly cause difficulty are reaching a certain age, and death before another. Other uncertain events occasionally appear in the cases. As has been seen, provisions in wills postponing distribution until some administrative step, such as probating the will, paying debts, completion of administration, winding up of a business, or sale of property, is taken, are construed, whenever possible, to postpone only enjoyment, not vesting.²³⁶ In *Skinner v. Taft*,²³⁷ a direction in a will that the executors transfer property to four named persons and their heirs and assigns, "after the payment of my just debts and funeral expenses" and upon the termination of a trust which was to terminate "five years from the date of the probating of my will in the County of which I may die a resident," was treated as valid, presumably on the theory that only enjoyment, not vesting, was postponed. In *Ostrander v. Muskegon Finance Co.*,²³⁸ the testator devised his estate to his wife, "Provided, she remains my widow." It was held that the widow took a present fee simple, subject to defeasance upon her remarriage.

Where it is clear that no interest was intended to pass unless and until an uncertain event should occur, the interest is contingent. *Conant v. Stone*²³⁹ involved a will which provided, "My said son to have the use and income from said estate so long as Lizzie Rice, his present wife, remains as his legal wife, but in case of her death or in case of a legal separation and divorce from my said

²³⁶ Part Two, note 132 *supra*.

²³⁷ 140 Mich. 282, 103 N.W. 702 (1905), Part Two, note 133 *supra*. Accord: *Fitzgerald v. City of Big Rapids*, 123 Mich. 281, 82 N.W. 56 (1900) (payment of debts and other legacies); *McGraw v. McGraw*, 176 Fed. 312 (6th Cir. 1910) (payment of debts). Cf. *De Buck v. Bousson*, 295 Mich. 164, 294 N.W. 135 (1940).

²³⁸ 230 Mich. 310, 202 N.W. 951 (1925).

²³⁹ 176 Mich. 654, 143 N.W. 39 (1913), Part One, note 191 *supra*.

son, I then give, devise and bequeath to my said son and to his heirs and assigns forever, said above mentioned interest in my estate." The devise of the fee was held contingent. Similarly, in *Dusbiber v. Melville*,²⁴⁰ a will provided, "Now, my will is, that in case she shall be compelled to live apart from her said husband, Frederick Melville, and shall have to support herself, that I give, devise and bequeath to her, the said Florence A. Melville, the sum of two thousand dollars, to be paid to her by my executor, out of my estate, as soon as my executor shall be convinced that it is impossible for the said Florence A. Melville to live with her husband . . ." This language was held to impose a condition precedent. In *Markham v. Hufford*,²⁴¹ a bequest "to be paid to him at the expiration of two years from the date of my demise: provided that he shall be deemed a reformed man, in the judgment of the executors of this will," was correctly held to be contingent.

A provision postponing enjoyment until a legatee or devisee reaches a certain age may be construed as a condition precedent which suspends vesting until the legatee reaches that age or the bequest may be found to vest indefeasibly, subject only to postponement of enjoyment, or to vest, subject to defeasance if the legatee dies before reaching the stipulated age.²⁴³ If the legatee is in being and ascertained and entitled to the income until receipt of the principal, the gift is usually found to be

²⁴⁰ 178 Mich. 601, 146 N.W. 208 (1914), Part One, note 191 *supra*. Cf. *Conrad v. Long*, 33 Mich. 78 (1875), where a remainder was devised, "upon this condition: if at any time subsequent she should conclude not to live with her present husband . . ." This was held to be a condition subsequent.

²⁴¹ 123 Mich. 505, 82 N.W. 222 (1900), Part Two, note 113 *supra*.

²⁴³ 2 Simes, LAW OF FUTURE INTERESTS, §350 (1936).

vested.²⁴⁴ In *Hull v. Osborn*,²⁴⁵ the residue of an estate was devised and bequeathed to two named grandchildren "on the terms and conditions herein contained and payable at the times and in the manner hereinafter set forth." Ten thousand dollars was to be paid to each of the persons "when she shall arrive at" the ages of twenty-one, twenty-five, thirty, thirty-five and forty years "and the remainder of the one-half of the residue hereby devised and bequeathed to the said Blanche Wyckoff Hull shall be paid to her when she shall arrive at the age of forty-five years." After like provision for the other legatee, the will provided that if either legatee should die without living issue before reaching forty-five, the unpaid portion of her share should be paid to the survivor "at the time and in the manner it would have been paid to such deceased grandchild had she lived." If both died under forty-five without living issue, there was a gift over to brothers, sisters, nephews, and nieces then living. It was held that the interest of the two grandchildren in the principal vested at once, subject to postponement of enjoyment and to defeasance upon death

²⁴⁴ *Id.*, §§351, 355, 356; PROPERTY RESTATEMENT, §§256-259 (1940). See *Wessborg v. Merrill*, 195 Mich. 556 at 569, 162 N.W. 102 (1917). In *Toms v. Williams*, 41 Mich. 552 at 565, 2 N.W. 814 (1879), Chief Justice Campbell said, "While there has been some variance among the authorities concerning the legal distinctions between vested and contingent estates, they chiefly agree *first* in favoring the vesting of interests, and *second* in treating future interests as vested when there is any present interest in the income of the property."

²⁴⁵ 151 Mich. 8, 113 N.W. 784 (1908). See: *Le Baron v. Shepherd*, 21 Mich. 263 (1870); *Knorr v. Millard*, 52 Mich. 542, 18 N.W. 349 (1884); *Knorr v. Millard*, 57 Mich. 265, 23 N.W. 807 (1885); *In re Dingle's Estate*, 319 Mich. 189, 29 N.W. (2d) 108 (1947). Cf. *Bennett v. Chapin*, 77 Mich. 526, 43 N.W. 893 (1889), Part One, note 611 *supra*, where property was to be transferred to a daughter when she reached thirty-five, but if she died before that to her issue or, if none, to another. The daughter was entitled to part of the income pending the transfer. It was held that her interest was indefeasibly vested. This result is, of course, unsound.

under forty-five. In *Gettins v. Grand Rapids Trust Co.*,²⁴⁶ there was a bequest to a trustee to pay the income to testatrix's daughter Belle for life and upon her death to pay portions of the principal to children of Belle who were then twenty-five and the issue of children who predeceased Belle,

"And any remaining portions, my trustee shall keep each as a special trust fund, for one each of her children surviving and being less than 25 years of age, and it shall pay to each such child the net income arising from his or her special fund, and upon a child reaching the age of 25 years, it shall pay, deliver and convey to said child his or her special trust fund; and in the event of the death of such child before the same shall reach the age of 25 years, my trustee shall pay, deliver and convey his or her special fund to my said daughter's children surviving, except this, that if any child has died with issue then surviving, said issue shall take the share the deceased child would receive if living - - -."

The Court held that the interests of the children of Belle were vested subject to defeasance on death under twenty-five. The provision for defeasance violated the Rule Against Perpetuities, but the interest of the children did not.

In *Hunter v. Hunter*,²⁴⁷ a will directed the executors to apply the income to the support of the testatrix's three

²⁴⁶249 Mich. 238, 228 N.W. 703 (1930); Part Two, notes 103, 145, *supra*. *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 687 (1934), Part Two, note 88 *supra*, involved a similar disposition. As the trust included land, it violated the statute prohibiting suspension of the absolute power of alienation. Part One, note 593, Part Two, note 53 *supra*. The Court did not clearly decide whether the interest of children, who were to receive income until they reached thirty and then the principal, was contingent or vested subject to defeasance but used language suggesting that their interest would violate the Rule Against Perpetuities unless *indefeasibly* vested. 267 Mich. 270 at 291-292. This is clearly unsound. A future interest vested subject to defeasance does not violate the Rule, although the provision for defeasance may. Cf. Part Two, note 280, *infra*.

²⁴⁷160 Mich. 218, 125 N.W. 71 (1910).

children until distribution, to distribute a third of the principal to each child on reaching thirty or, in the discretion of the executors, at any time after reaching twenty-one, and, in case any child die, to distribute its share to its issue or, if none, to the survivor. Two children died without issue before reaching twenty-one; the third died at twenty-seven, leaving issue, before distribution had been made. It was held that the estate of the surviving child took nothing; that his interest was either contingent upon surviving until distribution or vested subject to defeasance on death before reaching thirty.

If a will manifests no intention to give any interest to a legatee unless he reaches a certain age, his interest is, of course, contingent until he reaches that age. In *Michigan Trust Co. v. Baker*,²⁴⁸ there was a bequest to a trustee to pay the income from half to testatrix's son Stuart for life, then, "If my said son shall have lawful child or children of his body who shall survive him, his share of my estate shall go to such child or children, girls at age of 25 years and boys at 30 years and not before." It was held that the interests of the children would not vest until they reached the stated ages.

Alleged conditions of survival give rise to three types of problems: (1) whether the future interest in question is subject to such a condition; (2) who must be survived; and (3) whether the condition is precedent or subsequent; that is, whether the interest is contingent or vested subject to defeasance. If the future interest is a life estate following a prior life estate, it will never become possessory unless the remainderman survives the life ten-

²⁴⁸ 226 Mich. 72, 196 N.W. 976 (1924), Part Two, notes 102, 224, *supra*. Cf. *Burke v. Central Trust Co.*, 258 Mich. 588, 242 N.W. 760 (1932); Part Two, note 103 *supra*.

ant. If Andrew Baker devises land to James Thorpe for life, remainder to Lucy Baker for life, Lucy's interest, although vested, will not become possessory unless she survives James. If, however, the future interest is a fee simple or an absolute interest in personalty, the failure of the remainderman to survive the preceding estates does not affect his interest unless it is subject to a condition of survival. If Andrew Baker devises land to Lucy Baker for life, remainder to John Stiles in fee simple, John's remainder is not affected by his death before Lucy. It passes to his heirs, devisees, or assigns as if he owned a present estate in fee simple.²⁵⁰

When a *present* interest is devised to the surviving members of a group of persons, "surviving" normally means surviving the testator, because language in a will is ordinarily construed to speak from the death of the testator.²⁵¹ Hence if Andrew Baker devises land "to the surviving children of my deceased daughter Lucy," those children of Lucy who are living when Andrew dies will take. When, however, a *future* interest is devised to the surviving members of a group, the normal meaning would ordinarily seem to be "surviving the preceding estates." Thus if Andrew Baker devises land to Lucy Baker for life, remainder to her surviving children, he probably means those who survive Lucy. Most courts adopt this construction unless the context suggests a different meaning.²⁵² Michigan, however, appears to fol-

²⁵⁰ *Toms v. Williams*, 41 Mich. 552, 2 N.W. 814 (1879); *Curtis v. Fowler*, 66 Mich. 696, 33 N.W. 804 (1887); *Hovey v. Nellis*, 98 Mich. 374, 57 N.W. 255 (1894); *Hibler v. Hibler*, 104 Mich. 274, 62 N.W. 361 (1895); *Lariverre v. Rains*, 112 Mich. 276, 70 N.W. 583 (1897); *Conover v. Hewitt*, 125 Mich. 34, 83 N.W. 1009 (1900); *Holmes v. Holmes*, 215 Mich. 112, 183 N.W. 784 (1921); *In re Hurd's Estate*, 303 Mich. 504, 6 N.W. (2d) 758 (1942). But see: *Hunter v. Hunter*, Part Two, note 247 *supra*.

²⁵¹ *Eberts v. Eberts*, 42 Mich. 404, 4 N.W. 172 (1880).

²⁵² 2 Simes, *LAW OF FUTURE INTERESTS*, §349 (1936); *PROPERTY RE-STATEMENT*, §251 (1940).

low a minority rule that, even in this situation, "surviving" presumptively means "surviving the testator." In *Toms v. Williams*,²⁵³ land and other property were devised to a trustee to hold for eighteen years and then to transfer them to four named persons "or the survivor of them, and to their heirs and assigns forever, as tenants in common." It was held that the word "survivor" related to surviving the testator so that the interests vested indefeasibly on the death of the testator. *Rood v. Hovey*²⁵⁴ involved a will by which a testator devised his estate to his wife for life or widowhood, remainder to "my children now living, or who may be at the time of her decease or marriage." Two sons who survived the testator predeceased his widow. It was held that their interests vested indefeasibly on the death of the testator. In *Porter v. Porter*,²⁵⁵ a testator devised his estate to his wife for life and "on the decease of my wife, - - - I desire my property to be divided equally between my surviving children". One son survived the testator but predeceased his widow. It was held that an interest vested indefeasibly in this son upon his father's death and was not defeated by his failure to survive the life tenant.

The rule that "surviving" means "surviving the testator" being only a rule of construction, it ought to be

²⁵³ 41 Mich. 552, 2 N.W. 814 (1879); Part Two, notes 112, 244, *supra*. The four named persons were entitled to part of the income during part of the eighteen years.

²⁵⁴ 50 Mich. 395, 15 N.W. 525 (1883), Part Two, notes 198, 218, *supra*. *L'Etourneau v. Henquenet*, 89 Mich. 428, 50 N.W. 1077 (1891) is substantially *contra*. There land was devised to the widow for life, remainder to three named children with a provision that "whereas one or more of my said children may not survive me or my said wife" in such case the remainder to the survivors. The remainder was held vested subject to defeasance by failure to survive the widow.

²⁵⁵ 50 Mich. 456, 15 N.W. 550 (1883). Accord: *In re Patterson's Estate*, 227 Mich. 486, 198 N.W. 958 (1924).

overcome by a clear expression of contrary intention. In *Mullreed v. Clark*,²⁵⁶ where a remainder was devised to the testator's son James "and, if James should die without heirs, then" to testator's daughters, the trial court held that "die without heirs" meant die without heirs before the testator, so that James took an indefeasibly vested estate. The Supreme Court reversed, holding that "die without heirs" referred to the time of James's death. *Lambertson v. Case*²⁵⁷ involved a devise of land to testator's wife "as long as she lives, and when she gets through with it it shall go to Norma Lambertson if she is living, if not to J. V. Lambertson." Norma survived the testator but predeceased the life tenant. The court rejected a contention that "if she is living" referred to the time of the testator's death and held that Norma's remainder was contingent upon her surviving the life tenant and never vested. In one case, however, the Michigan Supreme Court has applied the rule as if it were a rule of law, defeating intent, rather than a rule of construction designed to ascertain intent. In *Sturgis v. Sturgis*,²⁵⁸ a testator devised land to his son David "for and during his natural life and to descend to his male children, if any shall survive *him*, if not, then to his female children, and should none of his children survive *him*" to other grandchildren of the testator. At the death of the testator, David had two sons, Frank and James. Frank predeceased David, leaving issue. It was held that the in-

²⁵⁶ 110 Mich. 229, 68 N.W. 138, 989 (1896), Part Two, notes 125, 183, *supra*.

²⁵⁷ 245 Mich. 208, 222 N.W. 182 (1928), Part Two, note 225 *supra*. In *re Blodgett's Estate*, 197 Mich. 455, 163 N.W. 907 (1917) involved a bequest to a wife for life, remainder to five children "or to such of them as shall be living at the time of my death in case I shall survive my wife, or at the time of my wife's death, in case she should survive me." It was held that the remainder was subject to a condition of surviving the wife.

²⁵⁸ 242 Mich. 52, 217 N.W. 771 (1928). Emphasis supplied.

terests of Frank and James vested indefeasibly at the death of the testator.

When a condition of survival is found to exist, the Michigan Supreme Court has shown a strong preference for a construction which would make the future interest affected by it vested subject to defeasance rather than contingent.²⁵⁹

When a remainder is vested, it is clear in Michigan as elsewhere that it is not subject to any condition of survivorship unless such a condition is imposed expressly or by implication by the terms of the limitation.²⁶⁰ As to contingent remainders, however, Michigan developed a peculiar doctrine, markedly inconsistent with the usual constructional preferences for early vesting and early indefeasibility, that every contingent remainder was subject to a condition of surviving the life tenant unless a contrary intention was expressly manifested. In *Fitzhugh v. Townsend*,²⁶¹ property was devised to a trustee for the life of a granddaughter, with remainder to the surviving issue of the granddaughter. In the event of the granddaughter's death without surviving issue, the property was to be divided among testatrix's brothers and sisters, "and the children of such of them as shall be no longer living." A brother of the testatrix who had died before

²⁵⁹ *L'Etourneau v. Henquenet*, 89 Mich. 428, 50 N.W. 1007 (1891), Part Two, note 254 *supra*; *McInerny v. Haase*, 163 Mich. 364, 128 N.W. 215 (1910), Part Two, note 216 *supra*; *Van Gallow v. Brandt*, 168 Mich. 642, 134 N.W. 1018 (1912). See: *Penny v. Mayer*, 279 Mich. 400, 272 N.W. 721 (1937). Accord: PROPERTY RESTATEMENT, §253 (1940). But see: *Hadley v. Henderson*, 214 Mich. 157, 183 N.W. 75 (1921), Part Two, note 262 *infra*; *Lambertson v. Case*, 245 Mich. 208, 222 N.W. 182 (1928), Part Two, notes 225, 257, *supra*; *In re Coots' Estate*, 253 Mich. 208, 234 N.W. 141 (1931), Part Two, note 263 *infra*; *Stevens v. Wildey*, 281 Mich. 377, 275 N.W. 179 (1937), Part Two, note 266 *infra*; *Horton v. Moore*, 110 F. (2d) 189 (6th Cir. 1940), Part One, note 372 *supra*.

²⁶⁰ Part Two, note 250 *supra*.

²⁶¹ 59 Mich. 427, 27 N.W. 561 (1886), Part Two, note 221 *supra*.

the will was made left a son, William, who survived the testatrix but predeceased the life beneficiary. It was held that William's interest was contingent both upon the death of the life beneficiary without issue and upon his surviving her, so that his estate took nothing. In *Hadley v. Henderson*,²⁶² there was a bequest to testator's son Charles, but in case Charles should die without issue, \$3,000 to a daughter Mary, \$2,000 to a sister Susan, \$1,000 to a niece Alice, and the residue to a missionary society. Susan predeceased the testator, survived by issue. Mary and Alice survived the testator but predeceased Charles. These three had no issue. It was held that the contingent legacies of Mary and Alice "lapsed" upon their death before Charles. *In re Coots' Estate*²⁶³ is the most notorious of this strange line of cases. There, land was devised to a trustee for the life of the survivor of the testator's widow and son, remainder to the son's children and their heirs, but if the son should die without issue, to six named nephews and nieces of the testator. Three of these nephews and nieces survived the testator but predeceased his son, who died without issue. The Court rejected the cogent argument that our statutes make contingent future estates descendible and devisable,²⁶⁴ which they cannot be if all are subject to a condition of survivorship until vesting, and held that the devises to the nephews and nieces were subject to a condition precedent of surviving the widow and son.

²⁶² 214 Mich. 157, 183 N.W. 75 (1921), Part Two, note 223 *supra*. *Contra*: PROPERTY RESTATEMENT, §261 (1940). See: Casner and Westfall, "Construction Problems," 5 AMERICAN LAW OF PROPERTY, §21.25 (1952).

²⁶³ 253 Mich. 208, 234 N.W. 141 (1931), *cert. den.*, *Delbridge v. Oldfield*, 284 U.S. 665 (1931), Part Two, note 226 *supra*. *Contra*: PROPERTY RESTATEMENT §261 (1940).

²⁶⁴ Part One, note 371 *supra*.

After this decision the Legislature enacted a statute providing:

"In all cases where the owner of an expectant estate, right or interest in real or personal property, shall die prior to the termination of the precedent or intermediate estate, if the contingency arises by which such owner would have been entitled to an estate in possession if living, his heirs at law if he died intestate, or his devisees or grantees and assigns if he shall have devised or conveyed such right or interest, shall be entitled to the same estate in possession."²⁶⁵

*Stevens v. Wildey*²⁶⁶ involved a will which became effective before the statute. By it, land was devised to Richard Odell for life, remainder to his children, but if he died without issue to Isaac Odell. Isaac survived the testator but predeceased Richard, who died without issue. It was held that Isaac's remainder "lapsed." The Court said, however, that the rule in the *Coots*' case was changed by the statute as to dispositions becoming effective after the statute. It would seem, therefore, that the strange rule in *In re Coots' Estate* is no longer the law of Michigan.

Professor Gray and many of the courts which have passed upon the question have taken the position that a limitation should be construed as if the Rule Against

²⁶⁵ Act 211, P.A. 1931; Mich. Stat. Ann. §26.47; Comp. Laws (1948), §554.101; Part One, note 372 *supra*.

²⁶⁶ 281 Mich. 377, 275 N.W. 179 (1937); Part Two, notes 124, 223, *supra*. See: *American Brass Co. v. Hauser*, 284 Mich. 194 at 200, 278 N.W. 816, 115 A.L.R. 1464 (1938); *Dodge v. Detroit Trust Co.*, 300 Mich. 575 at 606, 2 N.W. (2d) 509 (1942). In *In re East's Estate*, 325 Mich. 352, 38 N.W. (2d) 889 (1949), a remainder was limited by a will admitted to probate in 1905, to Percey C. Hunt in fee, "further, in case he dies without leaving direct heirs then said estate to be divided equally between my brothers and sisters." It was decided that the condition (dying without direct heirs) had not occurred, but the opinion suggests that the contingent future estate of the brothers and sisters was subject to a condition of surviving Percey. 325 Mich. 352 at 359, 363.

Perpetuities did not exist, and then the Rule should be applied to it, as so construed "remorselessly." American courts, however, are tending to adopt the view that when the limitation is capable of two possible constructions, one of which would violate the Rule and the other of which would not, the latter should be adopted.²⁶⁷ The Michigan Supreme Court has not clearly accepted either view, but it has indicated that it will not distort the language of a limitation in order to achieve a construction which would make it valid.²⁶⁸

²⁶⁷Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §629 (1915), but compare §633: "When the expression which a testator uses is really ambiguous, and is fairly capable of two constructions, one of which would produce a legal result, and the other a result that would be bad for remoteness, it is a fair presumption that the testator meant to create a legal rather than an illegal interest." Taking the two sections together, Professor Gray may only have meant that the language should not be distorted in order to achieve a construction which would make the limitation valid. See 2 Simes, *LAW OF FUTURE INTERESTS*, §550 (1936); *PROPERTY RESTATEMENT*, §375 (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY* §§22.44-22.46 (1952). The Restatement adopts and Leach and Tudor prefer the view that the effect of the Rule should have a bearing on construction. The classic statement of the view that it should not is that of Baron Parke in *Viscount Dungannon v. Smith*, 12 Cl. & F. 546 at 599, 8 Eng. Rep. 1523 at 1545 (1846). One of the best known statements of the other view is that of Lumpkin, J., in *Forman v. Troup*, 30 Ga. 496 at 499 (1860).

²⁶⁸*Rozell v. Rozell*, 217 Mich. 324, 186 N.W. 489 (1922). The limitation was to a son for life, remainder to his children for their lives, remainder to the children's heirs. The question was whether the class "children" closed at the testatrix's death or at her son's death. See Part Two, note 276 *infra*. But in *Dean v. Mumford*, 102 Mich. 510, 61 N.W. 7 (1894) the court held that a testamentary trust for testator's sons, their wives and children, included only wives whom they had at the testator's death, although one of the sons was then unmarried. The opinion indicates that this construction was adopted because any other would make the limitation invalid.

Class Gifts

A CLASS gift is a limitation of a property interest to a group of persons intended to take as an entity or unit rather than as specific individuals. When a limitation is to persons specified by their individual names, the grantor or testator may be assumed to have thought of them as separate individuals rather than as an entity, unit, or group. Hence, in the construction of limitations, there is a presumption that a limitation to named individuals is not a class gift.²⁶⁹ Being only a rule of construction, this presumption is overcome by a contrary manifestation of intention.²⁷⁰ When a limitation

²⁶⁹ *Hatt v. Green*, 180 Mich. 383, 147 N.W. 593 (1914) (to her children, i.e., George, Ellen, Milo, Merwin, Walter, Alfred, Sarah, Wade, and Governor); *In re Coots' Estate*, 253 Mich. 208, 234 N.W. 141 (1931), *cert. den.*, *Delbridge v. Oldfield*, 284 U.S. 665 (1931) (residue to be divided equally among seven named nephews and nieces); *Cattell v. Evans*, 301 Mich. 708, 4 N.W. (2d) 67 (1942) (residue to seven named persons, each to take an equal undivided one-seventh share). PROPERTY RESTATEMENT, §280 (1940); Casner, "Class Gifts," 5 AMERICAN LAW OF PROPERTY, §§22.5-22.8 (1952).

²⁷⁰ *Eyer v. Beck*, 70 Mich. 179, 38 N.W. 20 (1888) (my heirs, to wit: John Beck, the children of Christian Beck, Jr., deceased, Elizabeth Eicher, Gottsieb Beck, Peter Beck, Magdalena Eyer); *Lariverre v. Rains*, 112 Mich. 276, 70 N.W. 583 (1897) (remainder "to her said grandchildren, Joseph and Peter Lariverre, children of the said Joseph, her son, or to his heirs; it being expressly understood that, if her said son Joseph shall have more children at the time of his death, they shall share and share alike the said property"); *In re Ives' Estate*, 182 Mich. 699, 148 N.W. 727 (1914) (residue to sister Hattie and brothers Wesley and Dwight, to each an undivided one-third); *In re Hunter's Estate*, 212 Mich. 380, 180 N.W. 364 (1920) (residue to my two sisters, viz: Catherine and Ella, share and share alike); *Rodey v. Stotz*, 280 Mich. 90, 273 N.W. 404 (1937) (to the following named children of my said nephew, Fred, to wit: Edmund, Mildred, Wilmot and Helma, share and share alike); *American Brass Co. v. Hauser*, 284 Mich. 194, 278 N.W. 816, 115 A.L.R. 1464 (1938) (to my children. This will is made by me having in mind my children, Frank, Otto, Albert and Charles); PROPERTY RESTATEMENT, §281 (1940).

is to persons described only by a group designation, such as "children," "grandchildren," "brothers," "nephews," "cousins," "issue," "heirs," or "next of kin," the grantor or testator may be assumed to have thought of them as an entity or unit rather than as separate individuals. Hence, in the construction of limitations, there is a presumption that a limitation to persons described only by a group designation is a class gift.²⁷¹ Being only a rule of construction, this presumption is overcome by a contrary manifestation of intention.²⁷²

²⁷¹ See *v. Derr*, 57 Mich. 369, 24 N.W. 108 (1885) (conveyance of remainder to heirs of a living person created a class gift to his children); *Hovey v. Nellis*, 98 Mich. 374, 57 N.W. 255 (1894) (to the children of my said son); *McLain v. Howald*, 120 Mich. 274, 79 N.W. 182 (1899) (to my daughter Mary Ann, I give to each of her children one hundred dollars); *Porter v. Osmun*, 135 Mich. 361, 97 N.W. 756, 98 N.W. 859 (1904) (conveyance of remainder to heirs of a living person created a class gift to his children); *Sturgis v. Sturgis*, 242 Mich. 52, 217 N.W. 771 (1928) (remainder to the male children of a son); *In re Ecclestone's Estate*, 339 Mich. 15 at 24, 62 N.W. (2d) 606 (1954). See: *In re Churchill's Estate*, 230 Mich. 148, 203 N.W. 118 (1925). PROPERTY RESTATEMENT, §279 (1940); Casner, "Class Gifts," 5 AMERICAN LAW OF PROPERTY, §§22.9-22.11 (1952). Class gifts were involved in the following cases:

Bailey v. Bailey, 25 Mich. 185 (1872) (my lawful heirs); *Plant v. Weeks*, 39 Mich. 117 (1878) (children of my deceased sister Mary); *Hascall v. Cox*, 49 Mich. 435, 13 N.W. 807 (1882) (my legal heirs); *Morrison v. Estate of Sessions*, 70 Mich. 297, 38 N.W. 249 (1888) (my lawful heirs); *Clark v. Mack*, 161 Mich. 545, 126 N.W. 632 (1910) (nearest of kin); *Menard v. Campbell*, 180 Mich. 583, 147 N.W. 556 (1914) (at his decease to his heirs surviving); *Morse v. Lowe*, 182 Mich. 607, 148 N.W. 970 (1914) (his next of kin, by blood relationship); *Brooks v. Parks*, 189 Mich. 490, 155 N.W. 573 (1915) (after her decease to her heirs); *In re Shumway's Estate*, 194 Mich. 245, 160 N.W. 595 (1916) (after her decease to my legal heirs); *Russell v. Musson*, 240 Mich. 631, 216 N.W. 428 (1927) (surviving children of life tenant); *Hay v. Hay*, 317 Mich. 370, 26 N.W. (2d) 908 (1947) (remainder to my legal heirs); *In re East's Estate*, 325 Mich. 352, 38 N.W. (2d) 889 (1949) (remainder in case he dies without leaving direct heirs to my brothers and sisters). In *LaMere v. Jackson*, 288 Mich. 99, 284 N.W. 659 (1939), a class gift was held void for uncertainty as to the composition of the class. Other Michigan cases involving class gifts are cited in Part Two, notes 270 *supra*, 273-276, 279, 282, 284, 286, *infra*.

²⁷² *Strong v. Smith*, 84 Mich. 567, 48 N.W. 183 (1891) (to my own brothers and sisters and to the brothers and sisters of my said wife);

As in the case of limitations to individuals, when a future estate is limited to a class, the death of a member of the class before his interest becomes possessory does not defeat it unless it is subject to a condition of survival, express or implied. If Andrew Baker devises land to John Stiles for life, remainder to John's children in fee, and John has three children when Andrew dies, these children take a vested remainder. If one dies before John, his interest passes to his heirs, devisees, or assigns.²⁷³ If, however, a class gift is subject to a condition of survival, the effect of nonsurvival is different from that when the gift is to individuals, in that the share of the member of the class who fails to survive ordinarily passes to the surviving members of the class. If Andrew Baker devises land to John Stiles for life, remainder to those children of John who survive him, John has three

Downing v. Birney, 117 Mich. 675, 76 N.W. 125 (1898) (conveyance of remainder to the children of her body begotten); *Fullager v. Stockdale*, 138 Mich. 363, 101 N.W. 576 (1904) (conveyance to heirs of a living person vested indefeasible interests in her present living children); *Wessborg v. Merrill*, 195 Mich. 556, 162 N.W. 102 (1917) (bequest to my wife and five children). With the last case compare *In re Holtforth's Estate*, 298 Mich. 708, 299 N.W. 776 (1941) where a devise "to the seven children of my brother, - - and the survivor of them" was assumed to create a class gift.

²⁷³ *De Visme v. Mello*, 1 Bro. C.C. 537, 28 Eng. Rep. 1285 (1782) (personalty); *Rood v. Hovey*, 50 Mich. 395, 15 N.W. 525 (1883), Part Two, note 254 *supra*; *Porter v. Porter*, 50 Mich. 456, 15 N.W. 550 (1883), Part Two, note 255 *supra*; *Hovey v. Nellis*, 98 Mich. 374, 57 N.W. 255 (1894), Part Two, note 250 *supra*; *Conover v. Hewitt*, 125 Mich. 34, 83 N.W. 1009 (1900); *Porter v. Osmun*, 135 Mich. 361, 97 N.W. 756, 98 N.W. 859 (1904); *In re Patterson's Estate*, 227 Mich. 486, 198 N.W. 958 (1924), Part Two, note 255 *supra*; *Sturgis v. Sturgis*, 242 Mich. 52, 217 N.W. 771 (1928), Part Two, note 258 *supra*; *Rodey v. Stotz*, 280 Mich. 90, 273 N.W. 404 (1937). See *Lariverre v. Rains*, 112 Mich. 276 at 281, 70 N.W. 583 (1897). 2 Simes, *LAW OF FUTURE INTERESTS*, §390 (1936); Casner and Westfall, "Construction Problems," 5 *AMERICAN LAW OF PROPERTY*, §21.11 (1952). Cf. *Fitzhugh v. Townsend*, 59 Mich. 427, 27 N.W. 561 (1886), Part Two, notes 221, 261, *supra*. The class designation itself, e.g., "heirs," "next of kin," may imply a condition of survival. *PROPERTY RESTATEMENT*, §249, *Comments e, f.* (1940).

children when Andrew dies, and one of these dies before John, the entire remainder passes to the surviving two in the absence of other provisions in Andrew's will.²⁷⁴

A class gift differs from a limitation to individuals in that a class may open to admit new members after the effective date of the instrument containing the limitation. If Andrew Baker devises land to John Stiles for life, remainder to John's sons Henry and William in fee, a third son of John, born after the death of Andrew, will not take under the devise. If however, Andrew Baker devises land to John Stiles for life, remainder to the children of John, not only John's children in being at the death of Andrew but those born thereafter will share the remainder.²⁷⁵ A well-settled rule of construction, known as the "Rule of Convenience," prescribes that, in the absence of a manifestation of some other intention, a class closes when any member of it is entitled to possession of a share in the property. This means that the class will

²⁷⁴ *Eberts v. Eberts*, 42 Mich. 404, 4 N.W. 172 (1880); *Fitzhugh v. Townsend*, 59 Mich. 427, 27 N.W. 561 (1886), Part Two, notes 221, 261, *supra*; *In re Blodgett's Estate*, 197 Mich. 455, 163 N.W. 907 (1917), Part Two, note 257 *supra*; *American Brass Co. v. Hauser*, 284 Mich. 194, 278 N.W. 816, 115 A.L.R. 1464 (1938). See *In re Coots' Estate*, 253 Mich. 208 at 212, 234 N.W. 141 (1931); *Cattell v. Evans*, 301 Mich. 708, 4 N.W. (2d) 67 (1942). PROPERTY RESTATEMENT, §251, Ill. 1; c. 22, *Introductory Note*; §296, *Comment c.* and Ills. 1, 6 (1940); Casner and Westfall, "Construction Problems," 5 AMERICAN LAW OF PROPERTY, §21.12 (1952). If a limitation to individuals is subject to a condition of survivorship, the survivors take the shares of those who fail to survive only if the limitation creates a joint tenancy or contains express provisions therefor, as was the case in *L'Etourneau v. Henquet*, 89 Mich. 428, 50 N.W. 1077 (1891), Part Two, note 254 *supra*.

²⁷⁵ *Cheever v. Washtenaw Circuit Judge*, 45 Mich. 6, 7 N.W. 186 (1880); See *v. Derr*, 57 Mich. 369, 24 N.W. 108 (1885); *Hovey v. Nellis*, 98 Mich. 374, 57 N.W. 255 (1894); *Lariverre v. Rains*, 112 Mich. 276, 70 N.W. 583 (1897); *McLain v. Howald*, 120 Mich. 274, 79 N.W. 182 (1899); *Rozell v. Rozell*, 217 Mich. 324, 186 N.W. 489 (1922). Cf. *Knorr v. Millard*, 57 Mich. 265, 23 N.W. 807 (1885) (bequest, without precedent interest, to children of a living person, to be paid to them on coming of age). PROPERTY RESTATEMENT, c. 22, *Introductory Note* §279, Ill. 2. (1940).

not open to admit persons who come into being after this time. If Andrew Baker devises land to Lucy Baker for life, remainder to the children of John Stiles, children of John who are in being when Andrew dies or who come into being before Lucy dies constitute the class; children of John who come into being after the death of Lucy are not entitled to shares.²⁷⁶ Similarly, if Andrew Baker bequeaths property to the children of John Stiles who attain the age of twenty-one, children of John who come into being after a child of John has attained that age do not take.²⁷⁷

The Rule of Convenience has an important exception. If there is no member of the designated class in being at the time when, under the terms of the limitation, the interest of the class or some of its members would otherwise become possessory, the class does not close so long as it is possible for persons included within the class description to come into being. If Andrew Baker devises land to Lucy Baker for life, remainder to the children of John Stiles, and John has no children when Lucy

²⁷⁶ *Baldwin v. Karver*, 1 Cowp. 309, 98 Eng. Rep. 1102 (1775); *Cheever v. Washtenaw Circuit Judge*, 45 Mich. 6, 7 N.W. 186 (1880) (devise to daughter for life, remainder to her children and grandchildren); *McLain v. Howald*, 120 Mich. 274, 79 N.W. 182 (1899) (bequest to widow for life, remainder to children of daughter Mary Ann; child of Mary Ann *en ventre sa mere* when the widow died entitled to share); *Rozell v. Rozell*, 217 Mich. 324, 186 N.W. 489 (1922). PROPERTY RESTATEMENT, §295 (1940); 2 Simes, LAW OF FUTURE INTERESTS, §378 (1936); Casner, "Class Gifts," 5 AMERICAN LAW OF PROPERTY, §§22.40-22.46 (1952). Being only a rule of construction, the Rule of Convenience does not apply if a contrary intent is manifested. Thus in *Lariverre v. Rains*, 112 Mich. 276, 70 N.W. 583 (1897), Part Two, note 270 *supra*, the Court recognized that the language used expressly included members of the class who came into being after the remainder limited to it became possessory. This language is quoted in the text, Part One, note 264 *supra*.

²⁷⁷ *Andrews v. Partington*, 3 Bro. C.C. 401, 29 Eng. Rep. 610 (1791); *Hoste v. Pratt*, 3 Ves. Jr. 730, 30 Eng. Rep. 1243 (1798); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §379 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §382 (1936); PROPERTY RESTATEMENT, §295 (1940); Casner, "Class Gifts," 5 AMERICAN LAW OF PROPERTY, §22.44 (1952).

dies, all children of John, whenever born, will take. The first child of John will take the whole remainder subject to open, that is, to partial defeasance in favor of children of John born later.²⁷⁸

Chapters 9, 10, and 11 have made it evident that if the interest of any member of a class may possibly vest at a time beyond the period of the Rule Against Perpetuities, that interest is void, and, hence, if the interests of all members of the class may possibly vest at a time beyond the period of the Rule, the entire class gift is void. This is well settled in Michigan.²⁷⁹ The English cases and all American decisions involving the question go beyond this by holding that, for purposes of the Rule Against Perpetuities, a class gift stands or falls as a unit. If the interest of any member of the class may possibly vest at any time beyond the period of the Rule, the entire class gift is void, even though the interests of some members are presently vested or will certainly vest within the period.²⁸⁰ If Andrew Baker bequeaths property to James

²⁷⁸ *Hutcheson v. Jones*, 2 Madd. 124, 56 Eng. Rep. 281 (1817). See: *Wyndham v. Wyndham*, 3 Bro. C.C. 58, 29 Eng. Rep. 407 (1790); PROPERTY RESTATEMENT, §295 (b), Ill. 2 and *Comment o* (1940); 2 Simes, LAW OF FUTURE INTERESTS, §378 (1936); Casner, "Class Gifts," 5 AMERICAN LAW OF PROPERTY, §§22.42, 22.43 (1952).

²⁷⁹ *St. Amour v. Rivard*, 2 Mich. 294 (1852), Part Two, notes 39, 84, *supra*; *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924), Part Two, notes 102, 128, *supra*; *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N.W. 703 (1930), Part Two, note 145 *supra*; *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934), Part Two, note 88 *supra*.

²⁸⁰ *Jee v. Audley*, 1 Cox. 324, 29 Eng. Rep. 1186 (1787); *Routledge v. Dorril*, 2 Ves. Jr. 357, 30 Eng. Rep. 671 (1794); *Leake v. Robinson*, 2 Mer. 363, 35 Eng. Rep. 979 (1817); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §§373-376 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §§527, 528 (1936); PROPERTY RESTATEMENT, §§371, 383, 384 (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.26 (1952); Leach, "The Rule Against Perpetuities and Gifts to Classes," 51 HARV. L. REV. 1329-1353 (1938). In *Rozell v. Rozell*, 217 Mich. 324, 186 N.W. 489 (1922), land was devised to testator's son for life, remainder to the children of the son for their lives. When the testator died the son had five children. A

Thorpe upon trust to pay the income to John Stiles for life and then to transfer the principal to those children of John who reach the age of twenty-five, the entire class gift to the children of John is void, even if John has two children who are twenty-five and three under twenty-five when Andrew dies.²⁸¹ Considered alone, the interests of the two children who are already twenty-five would vest at once upon the death of Andrew, and those of the three under twenty-five would certainly vest or fail within their own lives, but John may have more children, born within four years of his death, who would reach twenty-five more than twenty-one years after John's death. The Rule of Convenience does not save such a gift because, under it, the class would not close against persons not in being until John's death.

The unit or "all or nothing" rule, that a class gift is void *in toto* if the interest of any possible member of the class violates the Rule Against Perpetuities, has two exceptions. First, when a fixed sum is given to each member of the class, the gifts to those members whose interests will certainly vest within the period of the Rule are valid even though the interests of other members violate the Rule and so are void.²⁸² If Andrew Baker be-

statute then in force forbade the limitation of successive estates for life to persons not in being (Chapter 19, *infra*). It was held that the entire limitation to the children of the son failed because the class would not close until the death of the son and so might include persons not in being at the death of the testator. And see Part Three, notes 78, 79, 81, *infra*.

²⁸¹ Vawdry v. Geddes, 1 Russ. & M. 203, 39 Eng. Rep. 78 (1830).

²⁸² Storrs v. Benbow, 3 DeG. M. & G. 390, 43 Eng. Rep. 153 (1853); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §389 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §528 (1936); PROPERTY RESTATEMENT, §385 (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.28 (1952). This type of gift was involved in McLain v. Howald, 120 Mich. 274, 79 N.W. 182 (1899), Part Two note 271 *supra*, and In re East's Estate, 325 Mich. 352, 38 N.W. (2d) 889 (1949), but in those cases no interest could possibly vest beyond the period of the Rule, the gift being to persons to be ascertained at the death of a life tenant.

queaths property to James Thorpe upon trust to pay the income to John Stiles for life, and then to transfer \$1,000 of the principal to each of those children of John who reach twenty-five, the interests of those children of John who are in being when Andrew dies are valid. The second exception is related to the first. When a class gift is made to a class consisting of several separated subclasses, the gifts to some subclasses may be valid although others fail. If Andrew Baker bequeaths property to James Thorpe upon trust to pay the income to John Stiles for life, then to pay the income to John's children for their lives and upon the death of any child of John to pay the principal upon which that child was receiving income to the issue of that child, the limitations to such issue are valid as to the issue of any child of John who was in being when Andrew died, although void as to issue of any child of John who came into being after Andrew's death.²⁸³

The interrelations between the Rule of Convenience and its exception and the unit or "all or nothing" rule and its two exceptions are perhaps best illustrated by a series of examples. If Andrew Baker bequeaths property to John Stiles for life and then to the grandchildren of John, the class gift is valid if John has a grandchild living when Andrew dies.²⁸⁴ That grandchild takes a vested

²⁸³ *Griffith v. Pownall*, 13 Sim. 393, 60 Eng. Rep. 152 (1843); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §391 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §528 (1936); *PROPERTY RESTATEMENT*, §389 (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.29 (1952).

²⁸⁴ In *Cheever v. Washtenaw* Circuit Judge, 45 Mich. 6, 7 N.W. 186 (1880), there was a bequest to testator's daughter Escalala for life, then to her children and grandchildren in equal shares. Escalala had children but no grandchildren when the testator died. The remainder to the class was correctly treated as valid. The living children took vested interests which would entitle them or their estates to possession of shares on their mother's death. This, under the Rule of Convenience, would close the class to afterborn grand-

interest which will entitle him or his estate to possession of a share when John dies. Under the Rule of Convenience, the class will close on the death of John and, therefore, all its members will be ascertained and their interests vested at the end of a life in being. If, on the other hand, John has no grandchild when Andrew dies, the class gift is void.²⁸⁵ John's grandchildren may be born after his death to children of John not in being when Andrew died. The Rule of Convenience is not certain to close the class at John's death because he may have no grandchildren at that time. Since it is possible that the interests of all of the members of the class may vest too remotely, they would all be void even if there were no unit or "all or nothing" rule.

If Andrew Baker bequeaths property "to my brothers and sisters for life, remainder to their children," the remainder is valid whether or not Andrew's parents are alive and whether or not there are children of his brothers and sisters in being at the time of his death.²⁸⁶ The brothers and sisters in being at his death will be entitled to possession at that time; therefore the Rule

children at the death of Escalala. As the Court held, grandchildren who came into being after the death of Escalala (the only ones whose interests might violate the Rule Against Perpetuities) would be excluded by the Rule of Convenience.

²⁸⁵ Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.25, Case 37 (1952). If there is no precedent estate, that is, if Andrew Baker bequeaths property "to the grandchildren of John Stiles," the result is the same as in the case of the postponed gifts described in the text. If John has grandchildren living when Andrew dies, they are entitled to immediate possession. Hence the Rule of Convenience closes the class at once and the gift is valid. If John has no grandchildren in being when Andrew dies, the class gift is void. John's only grandchildren may be children of his as yet unborn children, born after his death.

²⁸⁶ As to the validity of a bequest "to James Thorpe upon trust to pay the income semi-annually to my brothers and sisters for their lives and on the death of the survivor to transfer the corpus to their children in equal shares," see Casner, "Class Gifts," 5 AMERICAN LAW OF PROPERTY, §22.46 (1952).

of Convenience closes the class "brothers and sisters" to afterborn children of his parents. The children of the brothers and sisters must necessarily be born or conceived within their parents' lifetimes. If, on the other hand, Andrew Baker bequeaths property "to my brothers and sisters for life, remainder to my nephews and nieces in equal shares," the remainder is void unless Andrew's parents predecease him or he has a nephew or niece in being at the time of his death. His only nephews and nieces might be the children of brothers and sisters born after his death and might not come into being until after the deaths of those brothers and sisters who were alive when Andrew died. Here again, the gift would be void even if there were no unit or "all or nothing rule." If, in the last example, Andrew's parents predeceased him, the remainder will be valid because no more brothers and sisters can be born. Hence, all of Andrew's nieces and nephews must necessarily come into existence within lives in being. If there is a nephew or niece in being when Andrew dies, the remainder will also be valid. The class "brothers and sisters" will close under the Rule of Convenience on the death of Andrew. The nephew or niece in being when Andrew dies will take a vested right to possession of a share on the death of the living brothers and sisters. Hence, the class "nieces and nephews" will close at the end of a life in being.

If Andrew Baker bequeaths property to John Stiles for life and then to such of John's children as reach the age of twenty-five, and John has no children when Andrew dies, the remainder is void because all of John's children who reach twenty-five may be born within four years of John's death and so their interests would not vest until more than twenty-one years after a life in be-

ing.²⁸⁷ As has been seen, such a gift is also void *in toto* under the unit or "all or nothing" rule, even though John has children who have reached twenty-five when Andrew dies.²⁸⁸ The class will not close until John's death; children born within four years of his death will be included in it and, because reaching twenty-five is a condition precedent to their interests, those interests may not vest until more than twenty-one years after the death of John and those of his children who are living when Andrew dies. On the other hand, if Andrew Baker bequeaths property to John Stiles for life and then to John's children "but if any child of John dies before reaching twenty-five, his share shall pass to his issue," the class gift to the children is valid whether or not John has children when Andrew dies. Here the provisions as to age is not a condition precedent but one for defeasance. All of John's children must necessarily come into being during his lifetime, and their interests will vest as soon as they do, subject to defeasance on death before twenty-five.²⁸⁹ The provisions for defeasance are valid as to the shares of children of John

²⁸⁷ *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924), Part Two, notes 102, 128, *supra*; *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N.W. 703 (1930), Part Two, note 145 *supra*; *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934), Part Two, note 88 *supra*. Cf. *Burke v. Central Trust Co.*, 258 Mich. 588, 242 N.W. 760 (1932).

²⁸⁸ Part Two, note 281 *supra*. In this situation, if there is no precedent estate, that is, if Andrew Baker bequeaths property "to such of the children of John Stiles as reach the age of twenty-five years," the gift is valid if John has children who have reached twenty-five when Andrew dies. These children will be entitled to immediate possession of shares. Hence the class will close at once under the Rule of Convenience and afterborn children of John will take no interest. Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §379 (1915).

²⁸⁹ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §372 (1915); *PROPERTY RESTATEMENT*, §384, Ill. 2 (1944).

in being when Andrew dies but void as to the other shares.²⁹⁰

If Andrew Baker bequeaths property to John Stiles for life, remainder to the grandchildren of John, payable at their respective ages of twenty-five, the class gift is valid if John has a grandchild who has reached the age of four when Andrew dies.²⁹¹ The age provision is neither a condition precedent nor a provision for defeasance. Hence the grandchild who is four or his estate will certainly be entitled to possession of a share when twenty-five years after his birth have elapsed and John has died. This must happen within a life in being and twenty-one years, and, when it does, the class will close and all members of it, the grandchildren of John who come into being before the class closes, will have vested interests.

²⁹⁰ Part Two, note 283 *supra*; PROPERTY RESTATEMENT, §384, *Ill.* 2 (1944).

²⁹¹ Gray, RULE AGAINST PERPETUITIES, 3rd ed., §639aa. (1915); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.25, Case 40. (1952).

Powers of Appointment

IF ANDREW BAKER devises land to John Stiles for life, remainder to such children of John as John may appoint and, in default of appointment, to Lucy Baker in fee simple, Andrew is the donor of a power of appointment, John is the donee of the power, John's children are the objects of the power, and Lucy is the taker in default. When a power of appointment is created, problems as to validity under the Rule Against Perpetuities may arise as to (1) the power itself, (2) interests appointed under the power, and (3) the limitation in default of appointment. As the validity of limitations in default of appointment has been considered before, it may be best to treat this problem first.

A. INTERESTS LIMITED IN DEFAULT OF APPOINTMENT

A limitation in default of appointment may be vested, subject to defeasance by the exercise of the power.²⁹² The limitation to Lucy Baker in the example given in the preceding paragraph is of this type. A future interest which is vested subject to defeasance does not offend the Rule Against Perpetuities. But a limitation in default of appointment may be contingent. Such a limitation violates the Rule unless it is certain to vest, if at all, within the period of the Rule. If the power of appointment is limited as to objects or restricted to exercise by will, so that the donee cannot appoint to himself for his

²⁹² *McCarty v. Fish*, 87 Mich. 48, 49 N.W. 513 (1891), Part Two notes 160, 234 *supra*.

own exclusive benefit, the period of the Rule Against Perpetuities is computed, so far as the validity of the limitation in default of appointment is concerned, from the time when the instrument creating the power became effective.²⁹³ If Andrew Baker bequeaths property to John Stiles, who has no children, for life, remainder to such children of John as John may appoint and, in default of appointment, to those children of John who reach the age of twenty-five years, the period of the Rule is computed from the death of Andrew. At that time it

²⁹³ *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924); Part Two, notes 75-77 *supra*. Although agreeing that, in this situation, the period of the Rule commences upon the effective date of the instrument creating the power, Professor Leach thinks that facts occurring between that date and the time when the power expires may be considered in determining the validity of the limitation in default of appointment. Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.36 (1952). Compare Part Two, notes 127, 128, *supra*. He cited no authority for this view and conceded that there was none at the time he wrote, but the Supreme Judicial Court of Massachusetts later adopted his view. *Sears v. Coolidge* 329 Mass. 340, 108 N.E. (2d) 563 (1952), noted, 33 BOSTON UNIV. L. REV. 119 (1953), 66 HARV. L. REV. 937 (1953). *Michigan Trust Co. v. Baker*, *supra*, is opposed to the Leach view. There the limitations were (1) to testatrix's husband for life, with power to consume so much of the principal as he might desire for his support and comfort, (2) to a trustee to pay the income to testatrix's son Stuart for life, (3) to the daughters of Stuart who reach twenty-five and the sons who reach thirty, (4) in default of such children of Stuart, to other persons. Stuart predeceased the husband, leaving no issue, so if facts occurring before the expiration of the husband's power had been considered, the subsequent limitations would have been valid. They were held void.

It should be recalled that when a future interest is destructible by someone for his own benefit, the period of the Rule does not commence until the destructibility ceases. Part Two, note 70 *supra*. This doctrine applies to limitations in default of appointment and so qualifies the statement in the text in situations where such limitations are destructible by virtue of some other power than that in default of which they are limited. Moreover, Rev. Stat. 1846, c. 64, §12, Part Two, note 304 *infra*, provides that when a tenant for life has an unlimited power to dispose of the fee by will, he shall be deemed to possess an absolute power of disposition. The effect of the statute would seem to defer the commencement of the period of the Rule, as to interests limited in default of appointment, to the death of the donee. Compare Part Two, notes 297, 321, *infra*.

is not certain that any of John's children will reach the age of twenty-five within twenty-one years after John's death. Hence the limitation in default of appointment is void. That is, the existence of such a limited power of appointment has no bearing on the validity of interests limited in default of its exercise. If, on the other hand, the power is unlimited as to objects and purpose and presently exercisable by deed, so that the donee of the power could at any time appoint to himself for his own exclusive benefit, the period of the Rule Against Perpetuities is computed from the time when the power ceases to be exercisable.²⁹⁴ If Andrew Baker bequeaths property to John Stiles, who has no children, for life, remainder to such person or persons as John may by deed or will appoint and, in default of appointment, to those children of John who reach the age of twenty-five years, the period of the Rule is computed from the death of John because John could appoint to himself for his own exclusive benefit. At that time all of John's children are in being and all will reach twenty-five or die within their own lives. Hence the limitation in default of appointment is valid. That is, the existence of an unlimited power to destroy a future interest for the sole benefit of the holder of the power postpones the commencement of the period of the Rule Against Perpetuities.

B. POWERS OF APPOINTMENT THEMSELVES

A power of appointment itself, whether limited or unlimited, violates the Rule Against Perpetuities unless it

²⁹⁴ Part Two, notes 69-73 *supra*. Although such a gift in default of appointment does not violate the Rule Against Perpetuities, there is a line of Michigan cases (certainly unsound and probably overruled) holding that when a life tenant is given unlimited power to dispose of the fee by deed, a limitation in default of appointment is void for

is certain to be exercisable, if at all, within the period of the Rule, computed from the effective date of the instrument creating the power.²⁹⁵ If Andrew Baker devises land to John Stiles, who has no children, for life, remainder to James Thorpe in fee, subject to a power in the first son of John who reaches twenty-five to appoint the fee by deed or will to any person or persons, the power is void. It is not certain that a son of John will reach twenty-five and so be able to exercise the power within the period of the Rule. However, even though a power is limited to take effect on a contingency which may not occur within the period of the Rule, if the donee of the power is an ascertained, living human being, the power is valid because it will be exercisable, if at all, within the lifetime of the donee.²⁹⁶ If Andrew Baker

repugnancy. Part Two, notes 182, 183, *supra*. If the power permits disposition by deed or will, there should be no possible basis for the application of this repugnancy doctrine.

²⁹⁵ Wollaston v. King, L.R. 8 Eq. 165 (1868); Re Hargreaves, 43 Ch. D. 401 (C.A. 1890); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §475 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §535 (1936); PROPERTY RESTATEMENT, §390 (1) (1944). The Rule Against Perpetuities regulates only interests in property. Strictly speaking, a power of appointment is not an interest in property. Simes, "The Devolution of Title to Appointed Property," 33 ILL. L. REV. 480 at 488-490 (1928); PROPERTY RESTATEMENT, §390, *Comment b*, (1944). Accordingly, instead of saying that a power violates the Rule, it might be technically more accurate to say that, because any exercise of it would violate the Rule, the power is incapable of effective exercise. Foulke, "Powers and the Rule Against Perpetuities," 16 COL. L. REV. 537 at 539-540 (1916); Bettner, "The Rule Against Perpetuities as Applied to Powers of Appointment," 27 VA. L. REV. 149 at 151 (1940). The end result is the same, and the courts tend to use the language of the text.

²⁹⁶ Gray, RULE AGAINST PERPETUITIES, 3rd ed., §476 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §535 (1936); PROPERTY RESTATEMENT §390, *Comment c*. (1944). See: Re Hargreaves, 43 Ch. D. 401 at 405 (C.A. 1890). There is some doubt as to the soundness of this proposition in Michigan when the objects of the power are limited to persons other than the donee of the power because our statutes provide that when the disposition which a power authorizes is limited to be made to any particular person or class of persons, other than the donee of the power, the court of chancery shall exercise the power after the

devises land to John Stiles, who has no children, for life, remainder to James Thorpe in fee, subject to a power in John to appoint the fee by deed or will to any person or persons when and if John has a son who reaches twenty-five, the power is valid. It cannot be exercised unless John has a son who reaches twenty-five during the lifetime of John and so must be exercisable, if at all, within a life in being.

A power of appointment which is limited as to objects or exercisable only by will, so that the donee cannot appoint to himself for his own exclusive benefit, violates the Rule Against Perpetuities if it could possibly be exercised at a time beyond the period of the Rule, computed from the effective date of the instrument creating the power.²⁹⁷ If Andrew Baker bequeaths property to John Stiles, who has no son, for life, remainder to such

death of the donee unless the exercise of the power is made expressly to depend on the will of the donee. Rev. Stat. 1846 c. 64, §§23, 24, 28; Comp. Laws (1857) §§2680, 2681, 2685; Comp. Laws (1871) §§4163, 4164, 4168; Comp. Laws (1897) §§8878, 8879, 8883; How. Stat., §§5612, 5613, 5617; Comp. Laws (1915) §§11614, 11615, 11619; Comp. Laws (1929) §§13017, 13018, 13022; Mich. Stat. Ann., §§26.113, 26.114, 26.118; Comp. Laws (1948) §§556.23, 556.24, 556.28. If Andrew Baker devises land to John Stiles, who has no children, for life, remainder to James Thorpe in fee, subject to a power in John to appoint the fee to such of his issue as he may select when and if John has a son who reaches twenty-five, it might be argued that the statute permits the power to become exercisable more than twenty-one years after the death of John and so that it violates the Rule Against Perpetuities. See: *Matter of Christie*, 133 N.Y. 473, 31 N.E. 515 (1892); *Battelle v. Parks*, 2 Mich. 531 (1853); *American Brass Co. v. Hauser*, 284 Mich. 194, 278 N.W. 816, 115 A.L.R. 1464 (1938).

²⁹⁷ *Webb v. Sadler*, L.R. 14 Eq. 533 (1872), L.R. 8 Ch. App. 419 (1873); Gray, *RULE AGAINST PERPETUITIES*, §§474, 477 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §536 (1936); *PROPERTY RESTATEMENT*, §390 (2) (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.32 (1952). But Rev. Stat. 1846, c. 64, §12, Part Two, note 304 *infra*, provides that when a tenant for life has an unlimited power to dispose of the fee by will, he shall be deemed to possess an absolute power of disposition. The effect of the statute would seem to be that such a power will be treated as if the donee could appoint to himself for his own exclusive benefit. Compare Part Two, notes 293 *supra*, 321 *infra*.

female issue of John as John's eldest son may appoint, the power will certainly be exercisable, if at all, within a life in being and twenty-one years and so does not offend the rule stated in the preceding paragraph, but, since it may possibly be exercised more than twenty-one years after the death of John, it is void under the rule just stated. This means, in effect, that an unborn person cannot be the donee of a power which is limited or testamentary unless the exercise of the power is restricted by other terms of the instrument to a period measured by lives in being and twenty-one years. As a power of appointment limited to a living person cannot be exercised after his death, such a power does not violate the rule even though it is subject to a condition precedent which may never occur.²⁹⁸ A power of appointment which is unlimited as to objects and exercisable by deed, so that the donee can appoint to himself for his own exclusive benefit, does not offend the Rule Against Perpetuities merely because it could possibly be exercised at a time beyond the period of the Rule, so long as it will certainly be exercisable, if at all, within the period.²⁹⁹ If Andrew Baker bequeaths property to John Stiles, who has no son, for life, remainder to such persons as John's eldest son

²⁹⁸ But see Part Two, note 296 *supra*. A power of appointment which is not limited in duration to the life of the donee is bad unless its execution is restricted to the period of the Rule. Thus if Andrew Baker devises land to John Stiles and his heirs, subject to a power in Lucy Baker and her heirs to appoint the fee to any issue of the testator, the power is void. See Gray, *id.*, §475. It is not necessary to the validity of a power, however, that the donee have any other interest in the property. *Ostrander v. Muskegon Finance Co.*, 230 Mich. 310, 202 N.W. 951 (1925).

²⁹⁹ *Bray v. Hammersley*, 3 Sim. 513, 57 Eng. Rep. 1090 (1830), *sub nom.* *Bray v. Bree*, 2 Cl. & F. 453, 6 Eng. Rep. 1225 (1834); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §477 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §536 (1936); *PROPERTY RESTATEMENT*, §390, *Comment a.* (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.31 (1952).

may appoint, the power is valid even though, by its terms, the son may possibly exercise it more than twenty-one years after John's death.

If a power of appointment does not offend the rules stated in the preceding two paragraphs, it is not made invalid by the fact that, within its terms, an appointment could be made which would violate the Rule Against Perpetuities.³⁰⁰ If Andrew Baker bequeaths property to John Stiles for life and then to such issue of John as John may appoint, John might appoint to "my oldest male descendant living ninety years after the Penobscot Building falls." As will be seen, such an appointment would be void. But if John appoints to "my children in equal shares," the appointment is valid.

C. INTERESTS APPOINTED UNDER POWERS

Under general Anglo-American law, if a power of appointment is unlimited as to objects and exercisable by deed, so that the donee can appoint to himself for his own exclusive benefit, the period of the Rule Against Perpetuities is computed, for the purpose of determining the validity of interests appointed under the power, from the effective date of the appointment rather than that of the instrument creating the power.³⁰¹ If Andrew Baker

³⁰⁰ *Routledge v. Dorril*, 2 Ves. Jr. 357, 30 Eng. Rep. 671 (1794); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§473, 510 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §537 (1936); *PROPERTY RESTATEMENT*, §392, *Comment c.* (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.32 (1952). See: *Moss v. Axford*, 246 Mich. 288, 224 N.W. 425 (1929); Part Two, note 295 *supra*.

³⁰¹ *Bray v. Hammersley*, 3 Sim. 513, 57 Eng. Rep. 1090 (1830), *sub nom.* *Bray v. Bree*, 2 Cl. & F. 453, 6 Eng. Rep. 1225 (1834); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §524 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §537 (1936); Annotation, 1 A.L.R. 374 (1919), 101 A.L.R. 1282 (1936); *PROPERTY RESTATEMENT*, §391 (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF*

bequeaths property to John Stiles, who has neither children nor grandchildren, for life, remainder to such persons as John may by deed or will appoint, and John appoints by will to "my children for life, remainder to my grandchildren," the appointment is valid although all of John's children were born after Andrew's death and all of his grandchildren are born after his own death. In other words, a power of appointment under which the donee can at any time appoint to himself is the equivalent of absolute ownership for purposes of the Rule Against Perpetuities. An appointment under such a power is treated as if it were a limitation by the donee of his own property.

The applicability of the rule stated in the preceding paragraph to appointments of Michigan land is rendered somewhat doubtful by two sections of our statutes:

"Sec. 55. The period during which the absolute right of alienation may be suspended by any instrument in execution of a power, shall be computed from the time of the creation of the power, and not from the date of such instrument.

"Sec. 56. No estate or interest can be given or limited to any person, by an instrument in execution of a power, which such person would not have been capable of taking, under the instrument by which the power was granted." ³⁰²

PROPERTY, §24.33 (1952). See: *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270 at 285, 255 N.W. 287 (1934), quoting a passage from Halsbury's LAWS OF ENGLAND which reflects the rule stated in the text.

³⁰² Rev. Stat. 1846, c. 64, §§55, 56; Comp. Laws (1857) §§2712, 2713; Comp. Laws (1871) §§4195, 4196; Comp. Laws (1897) §§8910, 8911; How. Stat., §§5644, 5645; Comp. Laws (1915) §§11646, 11647; Comp. Laws (1929) §§13049, 13050; Mich. Stat. Ann., §§26.145, 26.146; Comp. Laws (1948) §§556.55, 556.56. These provisions do not appear to have been construed by the Michigan Supreme Court. Other provisions of the statutes on powers were construed in *Bates v. Leonard*, 99 Mich. 296, 58 N.W. 311 (1894), to reach the same result which would have obtained at common law.

These statutory provisions were taken from the New York Revised Statutes of 1829.³⁰³ The New York Court of Appeals has indicated that these two sections are modified by other sections of the statutes which, as in force in Michigan, provide:

“Sec. 9. When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate, for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts.

“Sec. 10. When a like power of disposition shall be given to any person to whom no particular estate is limited, such person shall also take a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors and purchasers.

“Sec. 11. In all cases where such power of disposition is given, and no remainder is limited on the estates of the grantee of the power, such grantee shall be entitled to an absolute fee.

“Sec. 12. When a general and beneficial power to devise the inheritance, shall be given to a tenant for life or for years, such tenant shall be deemed to possess an absolute power of disposition, within the meaning, and subject to the provisions of the three last preceding sections.

“Sec. 13. Every power of disposition shall be deemed absolute, by means of which the grantee is enabled, in

³⁰³ Part Two, c. I, Art. Third, §§128, 129. Because of the doubt as to its meaning raised in *Dempsey v. Tylee*, 3 Duer (10 N.Y. Super.) 73 (1854), Part Two, note 310 *infra*, Section 129 was amended by Laws 1909, c.52, to read: “An estate or interest can not be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power.” The sections are now Real Property Law, §§178, 179.

his lifetime, to dispose of the entire fee for his own benefit." ³⁰⁴

In the view of the New York Court, if the donee of a power has an absolute power of disposition of the entire fee within the meaning of Sections 9-13, Sections 55 and 56 have no application, and the validity of appointments made by him is determined as if he were in fact an absolute owner disposing of his own property. If the donee does not have an absolute power of disposition of the entire fee within the meaning of Sections 9-13, Sections 55 and 56 do apply and the validity of appointments is judged from the time of the creation of the power.³⁰⁵ If the donee of the power has unlimited ca-

³⁰⁴ Rev. Stat. 1846, c 64, §§9 to 13; Comp. Laws (1857) §§2666 to 2670; Comp. Laws (1871) §§4149 to 4153; Comp. Laws (1897) §§8864 to 8868; How. Stat., §§5598 to 5602; Comp. Laws (1915) §§11600-11604; Comp. Laws (1929) §§13003 to 13007; Mich. Stat. Ann., §§26.99-26.103; Comp. Laws (1948) §§556.9-556.13. N.Y. Rev. Stat. 1829, Part II, Art. Third, §§81-85 were identical, except as to section numbers. N.Y. Real Property Law, §§149 to 153, as presently in force, are virtually identical. These sections operated to eliminate the strange fiction of powers appendant, under which one person might have both the whole fee and a power to appoint the fee which would enable him to defeat dower and creditors. See: Simes, "The Devolution of Title to Appointed Property," 22 ILL. L. REV. 480 at 493-497 (1928).

The following section provides: "Sec. 14. When the grantor in any conveyance shall reserve to himself, for his own benefit an absolute power of revocation, such grantor shall still be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned." Such a power of revocation is not a power of appointment but, as it makes powers of appointment created by the conveyance, appointments under them, and limitations in default of appointment, destructible, it postpones the commencement of the period of the Rule Against Perpetuities, as to these interests, until its expiration. Part Two, notes 70, 293, *supra*, 322 *infra*. Bettner, "The Rule Against Perpetuities as Applied to Powers of Appointment," 27 VA. L. REV. 149 at 167-171 (1940).

Although these statutes purport to apply only to land, there is a tendency to extend them, by analogy, to personalty. *Townsend v. Gordon*, 308 Mich. 438, 14 N.W. (2d) 57 (1944); *In re Pilsbury's Will*, 50 Misc. 367, 113 App. Div. 893, 99 N.Y. Supp. 62, *affd.*, 186 N.Y. 545, 79 N.E. 1114 (1906).

³⁰⁵ *Farmers' Loan & Trust Co. v. Kip*, 192 N.Y. 266, 85 N.E. 59 (1908); Bettner, "The Rule Against Perpetuities as Applied to Powers of Appointment," 27 VA. L. REV. 149 at 167-171 (1940).

capacity to convey the *entire fee* to anyone, including himself, the New York view coincides with the common-law rule. If, however, the donee's unlimited power of disposition is limited to a future estate, it does not come within Sections 9-13, so Sections 55 and 56 apply. If Andrew Baker devises land to James Thorpe upon trust to pay the rents and profits to John Stiles for life, remainder as John Stiles may by deed or will appoint, John cannot dispose of the entire fee because, under New York and Michigan law, his equitable life interest as beneficiary of the trust is inalienable.³⁰⁶ Hence, even though his power to dispose of the remainder is unlimited and presently exercisable by deed, the validity of any appointment which he makes will be judged, under the New York view, from the death of Andrew.³⁰⁷

The reference in Section 55 to the "period during which the absolute right of alienation may be suspended" is to the provisions of Chapter 62 of the Revised Statutes of 1846 which prohibited suspension of the absolute power of alienation for more than two lives.³⁰⁸ Those provisions were repealed in 1949,³⁰⁹ so Section 55 no longer has any meaning in Michigan. It thus becomes important to know whether Section 56 is a mere adjunct or addendum to Section 55 which has ceased to have meaning or whether it is a provision of independent significance which invalidates any appointment made under a power unless the power is an absolute power of disposition of the entire fee within the meaning of Sections 9-13 or the donor of the power could have con-

³⁰⁶ Part One, notes 581, 583, 621, 625, *supra*. See: *Hunt v. Hunt*, 124 Mich. 502, 83 N.W. 371 (1900); *In re Peck Estates*, 320 Mich. 692, 32 N.W. (2d) 14 (1948); *Cutting v. Cutting*, 86 N.Y. 522 (1881).

³⁰⁷ *Farmers' Loan & Trust Co. v. Kip*, 192 N.Y. 266, 85 N.E. 59 (1908).

³⁰⁸ Part Two, note 47 *supra*.

³⁰⁹ Part Two, note 61 *supra*.

veyed or devised directly to the appointee by the instrument creating the power. That question was raised in *Dempsey v. Tylee*,³¹⁰ a New York case decided in 1854, where the problem involved was whether a married woman could create a power to appoint to her husband although she could not, in the then existing state of the law, convey directly to him. If Section 56 is read literally and is independent of Section 55, she could not do so. The majority of the court took this view, but Justice Duer, who had been one of the draftsmen of the New York Revised Statutes, filed an opinion in which he said:

“From the construction, however, which my brother has given to § 129 [Michigan § 56], in the article “Of Powers”, it seems proper that I should now say, that I entirely dissent. As I construe that section, it only means that no person shall take an estate under a power that, if limited to him by the instrument creating the power, would have involved an undue suspense of the power of alienation; in other words, where its direct limitation would have been void, as too remote. Section 129 merely declares the legal consequence of the rule which § 128 [Michigan § 55] establishes, and is to be construed, precisely as if the word ‘hence’ had connected the sections, by following the first, and preceding the second and both the sections are expressed very nearly in the words in which the rule and its consequence will be found to be stated by the most approved text writers on this abstruse branch of the law, Fearn, Sugden, and Cruise. As I construe the section, therefore, it refers only to the nature of the estate granted, and not at all to any personal incapacity of the grantee, other than that which the rule, declared in § 128, necessarily creates, although it cannot be denied that the words of the section are quite susceptible of the interpretation that my brother Bosworth has given to them.”³¹¹

³¹⁰ 3 Duer (10 N.Y. Super.) 73 (1854).

³¹¹ 3 Duer (10 N.Y. Super.) 73 at 101-102. See Part Two, note 303 *supra*.

To return to the example given in the first paragraph of this section:³¹² If Andrew Baker devises property to John Stiles, who has neither children nor grandchildren, for life, remainder to such persons as John may by deed or will appoint, it is clear that John has an absolute power of disposition of the entire fee under Sections 9 and 13. Accordingly, under the New York view, which Michigan is likely to follow, Sections 55 and 56 have no application,³¹³ from which it follows that the period of the Rule Against Perpetuities does not commence until John exercises the power. Hence, if he appoints by will to "my children for life, remainder to my grandchildren," the appointment is valid, as at common law. If, on the other hand, Andrew Baker devises property to James Thorpe upon trust to pay the income to John Stiles, who has no children or grandchildren, for life, remainder to such persons as John may by deed or will appoint, John does not have an absolute power of disposition of the entire fee under Sections 9 and 13. Under the New York view, Sections 55 and 56 apply.³¹⁴ Section 55 no longer has meaning in Michigan, but, if our courts should follow the majority view in *Dempsey v. Tylee*³¹⁵ that Section 56 has independent and literal significance, it would seem that John could not appoint to "my children, remainder to my grandchildren," because Andrew Baker could not have made a devise directly to John's grandchildren. In this situation, then, our law would differ from the common law as to the application of the Rule Against Perpetuities to appointments made under unlimited powers to ap-

³¹² In the text immediately following Part Two, note 301 *supra*.

³¹³ Part Two, note 305 *supra*.

³¹⁴ Part Two, note 307 *supra*.

³¹⁵ Part Two, note 310 *supra*.

point by deed or will. If our courts should accept the Duer view in *Dempsey v. Tylee*³¹⁶ that Section 56 has no independent significance and relates only to the statutes prohibiting suspension of the absolute power of alienation, now repealed in Michigan, then that section no longer has meaning here and the common law applies. In view of the doubt which exists, Sections 55 and 56 should be repealed or modified so as to make clear this phase of the law.

The New York and Michigan statutes governing powers of appointment purport to apply only to interests in land. The courts of both states have tended to extend them, by analogy, to powers of appointment of chattels personal.³¹⁷ If Section 56 should be deemed to have independent and literal significance, the distinction would, of course, become important because, if it does not apply to dispositions of chattels personal, they are governed by the common law.

The older English cases and the great weight of American authority hold that, when a power of appointment is restricted to exercise by will, the period of the Rule Against Perpetuities is computed, as to interests appointed, from the creation of the power rather than the time of its exercise, even though the objects of the power are unlimited, so that the donee could appoint to his own estate.³¹⁸ The more recent English decisions and

³¹⁶ Part. Two, note 311 *supra*.

³¹⁷ *In re Pilsbury's Will*, 50 Misc. 367, 113 App. Div. 893, 99 N.Y. Supp. 62, *aff'd.*, 186 N.Y. 545, 79 N.E. 1114 (1906); *Townsend v. Gordon*, 308 Mich. 438, 14 N.W. (2d) 57 (1944).

³¹⁸ *Wollaston v. King*, L.R. 8 Eq. 165 (1868); *In re Powell's Trusts*, 39 L.J. Ch. 188 (1869); *Morgan v. Gronow*, L.R. 16 Eq. 1 (1873); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §§526-526c, 948-969 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §538 (1936); Annotation, 1 A.L.R. 374 (1919), 101 A.L.R. 1282 (1936); PROPERTY RESTATEMENT, §392 (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.34 (1952).

one in Wisconsin hold that, even though a power is restricted to exercise by will, if it is unlimited as to objects, the period of the Rule does not commence until the power is exercised.³¹⁹ Section 12 of Chapter 64 of the Revised Statutes of 1846³²⁰ provides that, if a tenant for life has unlimited power to devise the fee, he shall be deemed to possess an absolute power of disposition. It would seem that the effect of this statutory provision is that, in Michigan, even though the power as to the remainder is limited to exercise by will, if the donee is enabled to dispose of the entire fee, including his own life estate, for his own benefit, the period of the Rule Against Perpetuities does not commence until the power is exercised, that is, from the death of the life tenant.³²¹ If a testamentary power is unlimited as to objects but the donee cannot dispose of the entire fee, the same doubtful situation described in the preceding paragraph exists.

³¹⁹ *Rous v. Jackson*, 29 Ch. D. 521 (1885); *Miller v. Douglass*, 192 Wis. 486, 213 N.W. 320 (1927).

³²⁰ Part Two, note 304 *supra*. But there must be power to dispose of the entire fee. A life *cestui* of a trust with unlimited power to appoint the remainder cannot dispose of the entire fee if, because of spendthrift provisions as to personalty or the statutory restraint on alienation as to land, he cannot transfer his own life interest. *Hunt v. Hunt*, 124 Mich. 502, 83 N.W. 371 (1900); *In re Peck Estates*, 320 Mich. 692, 32 N.W. (2d) 14 (1948); *Dana v. Murray*, 122 N.Y. 604, 26 N.E. 21 (1890).

³²¹ *Farmers' Loan & Trust Co. v. Kip*, 192 N.Y. 266, 85 N.E. 59 (1908); PROPERTY RESTATEMENT, §391, *Comment h., App.* Ch. A. par. 36 (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.34 (1952). *In re Kilpatrick's Estate*, 318 Mich. 445, 28 N.W. (2d) 286 (1947) involved a bequest to a trustee to pay the income to testator's wife for life and to transfer to her any part of the principal which she might request, remainder as the wife might appoint by will. No perpetuities problem was involved. As the wife had an immediate right to demand the whole principal, it would seem that the period of the Rule Against Perpetuities should be computed from the time she made an appointment rather than from her husband's death under both the common-law and statutory rules.

It is well settled everywhere that when a power of appointment is limited as to objects, so that the donee cannot appoint to himself or his estate, the period of the Rule Against Perpetuities is computed from the effective date of the instrument creating the power.³²² If Andrew Baker bequeaths property to John Stiles for life, remainder to such issue of John as John may appoint, the period of the Rule commences at the death of Andrew. It will be recalled that events which occur after the commencement of the period ordinarily cannot be considered in determining whether interests are certain to vest within the period.³²³ When the period commences at the creation of a power of appointment, however, facts which occur between the creation and exercise of the power may be so considered.³²⁴ If Andrew Baker bequeaths property to John Stiles, who has no issue, for life, remainder to such of John's issue as John may by will appoint and John appoints by will to "my son Henry for life, remainder to his children," the appointment to the children of Henry is invalid if Henry is

³²² *Routledge v. Dorril*, 2 Ves. Jr. 357, 30 Eng. Rep. 671 (1794); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§473, 514 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §537 (1936); Annotation, 1 A.L.R. 374 (1919), 101 A.L.R. 1282 (1936); *PROPERTY RESTATEMENT*, §392 (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.34 (1952). It should be borne in mind, however, that if the power itself and interests created by appointment under it are destructible by virtue of some other power, the period of the Rule does not commence until the destructibility ceases. Part Two note 70 *supra*. See: Foulke, "Powers and the Rule Against Perpetuities," 16 *COL. L. REV.* 537 at 541 (1916).

³²³ *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924); Part Two, notes 127-129, *supra*.

³²⁴ *Routledge v. Dorril*, 2 Ves. Jr. 357, 30 Eng. Rep. 671 (1794); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§515, 516 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §537; *PROPERTY RESTATEMENT*, §392 (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.35 (1952); Simes, "The Devolution of Title to Appointed Property," 22 *ILL. L. REV.* 480 at 502 (1928). Cf. Part Three, note 152 *infra*.

alive when John dies, because the class may include children born more than twenty-one years after the death of John, the only measuring life designated in Andrew's will. If, however, Henry predeceased John, the appointment to his children is valid. The fact of Henry's death may be considered, and it makes it certain that all of Henry's children came into being during the life of John.³²⁵

The repeal in 1949 of the statutes prohibiting suspension of the absolute power of alienation for more than two lives³²⁶ creates a difficult question as to powers of appointment created by instruments which became effective before the repeal but exercised after the repeal. Is the validity of an appointment made after the repeal under a power created before governed by the repealed statutes? Such authority as there is indicates that it is if the power is limited as to objects.³²⁷ Probably it is not if the power is an absolute power of disposition of the entire fee within the meaning of Sections 9-13.³²⁸

³²⁵ Rev. Stat. 1846, c.64, §56, Part Two, note 302 *supra*, should not affect the result in such a situation. Andrew could have bequeathed directly to "the children of any son of John Stiles who may predecease John" because such children would necessarily come into being during the life of John.

³²⁶ Part Two, notes 46, 61, *supra*.

³²⁷ *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33 (1908); Simes, "The Devolution of Title to Appointed Property," 22 ILL. L. REV. 480 at 515 (1928). But see: *Re Leigh's Marriage Settlement*, [1952] 2 All Eng. L.R. 57.

³²⁸ Part Two, note 304 *supra*.

Interests to Which the Rule Applies

SPEAKING generally, as Chapters 9, 11, and 12 have indicated, the requirement of certainty of vesting within the period of the Rule Against Perpetuities applies to all future interests in property limited to persons other than the transferor, whether in land or in chattels, whether legal or equitable, and whether, under English law, they would have been remainders, executory interests, powers of appointment, or interests created by the exercise of a power of appointment.³²⁹ There remain for consideration (1) interests retained by or created in the transferor under the terms of the instrument of transfer, (2) interests created in others which are not strictly property rights but derive from the law of contract, and (3) interests which are excepted from the operation of the Rule.

³²⁹ This statement should be read with the qualification that certain administrative powers which do not have the characteristics of a power of appointment are not subject to the Rule Against Perpetuities. A power of appointment is dispositive in character. Its exercise cuts off an interest of a taker in default and creates one in the appointee. PROPERTY RESTATEMENT, §318, *Comment g.* (1940). Trustees' powers to sell, lease, mortgage, invest, and appoint successor trustees during the term of the trust are not dispositive in character and are not subject to the Rule. PROPERTY RESTATEMENT, §382 (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.63 (1952). The same is true as to a mortgagee's power of sale. Gray, RULE AGAINST PERPETUITIES, 3rd ed., §562-571 (1915). However, powers of a trustee which are dispositive in character, such as a discretionary power to allocate income between life beneficiaries or to apply principal to the use of a life beneficiary, are subject to the Rule. Leach and Tudor, *id.*, §24.32. Cf. Chapter 20, Section B (1), *infra*.

A. INTERESTS OF A TRANSFEROR

When an owner of property transfers an interest in it which is less than his whole interest and less than a fee simple, or the equivalent in personalty, his retained interest is a reversion. If Andrew Baker, owning land in fee simple, conveys it to John Stiles for life, in tail, or for forty years, Andrew retains a reversion expectant upon the termination of John's estate.³³⁰ When an owner in fee simple transfers an estate for life followed by a contingent remainder, he retains a reversion. Thus if Andrew Baker conveys land to John Stiles, who has no son, for life, remainder to the eldest son of John and his heirs, Andrew retains a reversion in fee simple which will become possessory on the death of John if John never has a son.³³¹ Although, as in the last example, a reversion may be subject to defeasance, all reversions

³³⁰ 1 Simes, *LAW OF FUTURE INTERESTS*, §§42-49 (1936); *PROPERTY RESTATEMENT*, §154 (1936). Rev. Stat. 1846, c. 62, §12, Comp. Laws (1857) §2596; Comp. Laws (1871) §4079; Comp. Laws (1897) §8794; How. Stat., §5528; Comp. Laws (1915) §11530; Comp. Laws (1929) §12932; Mich. Stat. Ann., §26.12; Comp. Laws (1948) §554.12, provides: "A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised."

There cannot be a reversion expectant upon an estate tail in Michigan because our statutes convert estates tail into estates in fee simple. Part One, note 84 *supra*. There is no such thing as a reversion expectant upon a fee simple. A reversionary interest expectant upon a fee simple is a possibility of reverter. Part Two, note 335 *infra*. In strict common-law theory, a reversion expectant upon an estate for years is a present rather than a future estate, since the lessor retains seisin. Cf. Part Two, note 150 *supra*. Our statutes appear to define such a reversion as a future estate. Part Two note 179 *supra*. Nevertheless, Chief Justice Campbell referred to such a reversion as a "present estate in possession" in *Toms v. Williams*, 41 Mich. 552 at 572, 2 N.W. 814 (1879).

³³¹ *Egerton v. Massey*, 3 C.B. n.s. 338, 140 Eng. Rep. 771 (1857); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §113a (1915); 1 Simes, *LAW OF FUTURE INTERESTS*, §45 (1936); *PROPERTY RESTATEMENT*, §154, *Ill.* 6 (1936). A conveyance of the springing use type, e.g., Andrew Baker to John Stiles and his heirs when and if John marries Lucy Baker, leaves a present estate in the transferor. Simes, *id.*, §43.

are deemed to be vested,³³² and they are not subject to the Rule Against Perpetuities.³³³ If Andrew Baker bequeaths land to John Stiles for a thousand years "but if John's descendants ever become extinct, then the estate bequeathed to him shall terminate," the heirs of Andrew have a valid reversion which will become possessory on the extinction of John's descendants or the expiration of a thousand years, whichever first occurs.³³⁴

When an owner in fee simple transfers an estate in fee simple on special limitation, his retained interest is a possibility of reverter.³³⁵ If John Stiles conveys land to the Detroit, Lansing, and Northern Railroad Company "so long as used for railroad purposes," John has a possibility of reverter which will become possessory when use for railroad purposes ceases. There is disagreement among the authorities as to whether such an interest is vested or contingent.³³⁶ A recent English decision holds

³³² Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §113 (1915); 1 Simes, *LAW OF FUTURE INTERESTS*, §47 (1936).

³³³ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §283 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §§504, 508 (1936); *PROPERTY RESTATEMENT* §372 (1944).

³³⁴ See: *Gore v. Gore*, 2 P. Wms. 28, 24 Eng. Rep. 629 (1722); *Wood v. Drew*, 33 Beav. 610, 55 Eng. Rep. 505 (1864); *Toms v. Williams*, 41 Mich. 552 at 572, 2 N.W. 814 (1879); *Negaunee Iron Co. v. Iron Cliffs Co.*, 134 Mich. 264, 96 N.W. 468 (1901), Part One, note 323 *supra* (reversion expectant upon 99-year lease on special limitation); *Great Lakes Realty & Building Co. v. Turner*, 190 Mich. 582, 157 N.W. 57 (1916), Part One, note 331 *supra* (reversion expectant upon 99-year lease subject to condition subsequent); *C.J. Netting Co. v. Sillman*, 226 Mich. 307, 197 N.W. 545 (1924), Part One, note 334 *supra* (reversion expectant upon 50-year lease subject to condition subsequent); *Smith v. Applebaum*, 241 Mich. 493, 217 N.W. 401 (1928), Part One, note 320 *supra* (reversion expectant upon 99-year lease subject to condition subsequent); *Webb v. Knauss*, 253 Mich. 197, 234 N.W. 154 (1931), Part One, note 339 *supra* (same as preceding); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §209 (1915). Cf. Part Two, notes 150, 330, *supra*.

³³⁵ *PROPERTY RESTATEMENT*, §154, *Comment c.* (1936); 1 Simes, *LAW OF FUTURE INTERESTS*, §§177-187 (1936); Part One, note 354 *supra*.

³³⁶ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §113, n.3 (1915) (vested); *PROPERTY RESTATEMENT*, §154 (3) and *Comment e.* (1936)

that it is contingent, subject to the Rule Against Perpetuities and, consequently, void, if the event which will terminate the estate conveyed may not occur within the period of the Rule.³³⁷ All American authority is to the effect that possibilities of reverter are not subject to the Rule.³³⁸ Several Michigan decisions assume the validity of possibilities of reverter,³³⁹ but they relate to conveyances which became effective between 1847 and 1949, when the common-law Rule Against Perpetuities was not in force as to Michigan land.³⁴⁰

When an owner in fee simple transfers an estate in fee simple on condition subsequent, his retained interest is a right of entry.³⁴¹ If John Stiles conveys land to the Detroit, Lansing, and Northern Railroad Company "but if the said land shall cease to be used for railroad purposes the grantor or his heirs may enter and terminate the

(not vested); 2 Simes, *LAW OF FUTURE INTERESTS*, §507 (1936) (essentially contingent).

³³⁷ *Hopper v. Corporation of Liverpool*, 88 Sol. J. 213 (1944), noted, 62 L. QUAR. REV. 222 (1946). But see: *In re Chardon*, [1928] 1 Ch. 464; Cheshire, *MODERN LAW OF REAL PROPERTY*, 6th ed., 520 (1949).

³³⁸ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§41, 312 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §507 (1936); *PROPERTY RESTATEMENT*, §372 and *Comment a.* (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.62 (1952).

³³⁹ *School District No. 5 of Delhi v. Everett*, 52 Mich. 314, 17 N.W. 926 (1883); *Lemmen v. Allendale Grange* No. 421, 201 Mich. 179, 166 N.W. 1003 (1918); *Fractional School District No. 9 v. Beardslee*, 248 Mich. 112, 226 N.W. 867 (1929); *Thomas v. Jewell*, 300 Mich. 556, 2 N.W. (2d) 501 (1942); Part One, note 377 *supra*. Language in *Thayer v. McGee*, 20 Mich. 195 at 211 (1870) might be thought to recognize the validity of a possibility of reverter under a conveyance executed before 1847.

³⁴⁰ Part Two, note 50 *supra*.

³⁴¹ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §12 (1915); 1 Simes, *LAW OF FUTURE INTERESTS*, §159 (1936). *PROPERTY RESTATEMENT*, §24, *Comment b.* (1936) denominates such an interest a "power of termination." This term is not a happy one because the old law made a sharp distinction between a condition subsequent, which was permissible in a common-law conveyance, and a power of revocation, which could be used only in a conveyance operating under the Statute of Uses. 1 Coke, *INSTITUTES*, 237a (1628).

estate hereby granted," John has a right of entry which will entitle him or his heirs to take possession when use for railroad purposes ceases. Such rights of entry are contingent,³⁴² and recent English cases indicate that they are subject to the Rule Against Perpetuities and so void if the event which will entitle the transferor to enter is not certain to occur within the period of the Rule.³⁴³ The American decisions are to the effect that rights of entry on breach of condition subsequent are not subject to the Rule.³⁴⁴ No Michigan reported decision discusses the applicability of the Rule Against Perpetuities to rights of entry. Their validity has been assumed in cases involving conveyances executed both before³⁴⁵ and after³⁴⁶ 1847, and they have been enforced in a few in-

³⁴² Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §304 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §506 (1936).

³⁴³ *In re Trustees of Hollis' Hospital*, [1899] 2 Ch. 540; *In re Da Costa*, [1912] 1 Ch. 337; *Re Peel's Release*, [1921] 2 Ch. 218. See: *In re Macleay*, L.R. 20 Eq. 186 at 190 (1875); *Dunn v. Flood*, 25 Ch. D. 629 at 633 (1882), *aff'd.*, 28 Ch. D. 586 at 592 (1885). Stat. 15 Geo. V, c. 20 §4 (3) (1925) expressly subjects rights of entry to the Rule.

³⁴⁴ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §304 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §506 (1936); *PROPERTY RESTATEMENT*, §372 (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.62 (1952).

³⁴⁵ *Michigan State Bank v. Hastings*, 1 Dougl. 225 (Mich. 1844); *Michigan State Bank v. Hammond*, 1 Dougl. 527 (Mich. 1845); *People v. Beaubien*, 2 Dougl. 256 (Mich. 1846); *Campau v. Chene*, 1 Mich. 400 (1850); *City of Detroit v. Detroit & Milwaukee R.R. Co.*, 23 Mich. 173 (1871); *Hatch v. Village of St. Joseph*, 68 Mich. 220, 36 N.W. 36 (1888); *County of Oakland v. Mack*, 243 Mich. 279, 220 N.W. 801 (1928). The rights of entry involved in these cases and those cited in the two following notes were on breach of conditions subsequent, which might not occur within the period of the Rule annexed to conveyances in fee simple. A right of entry on breach of a condition subsequent in a conveyance of a term of years (lease) is an incident of the reversion, which is vested. Part One, notes 360, 375, Part Two, notes 330, 334, *supra*.

³⁴⁶ *Blanchard v. Detroit, Lansing & Lake Michigan R.R. Co.*, 31 Mich. 42 (1875); *Barrie v. Smith*, 47 Mich. 130, 10 N.W. 168 (1881), Part One, note 142 *supra*; *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 42 N.W. 532 (1889); *Jenks v. Pawlowski*, 98 Mich. 110, 56 N.W. 1105 (1893); *Leggett v. City of Detroit*, 137 Mich. 247, 100 N.W. 566 (1904); *Adams v. First Baptist Church of St. Charles*, 148 Mich. 140,

stances where the conveyances were executed after 1847.³⁴⁷

The American exemption of possibilities of reverter and rights of entry on breach of condition subsequent from the operation of the Rule Against Perpetuities is a strange anomaly. If Andrew Baker conveys land to James Thorpe and his heirs so long as the Penobscot Building shall stand and then to John Stiles and his heirs, the interest of John is void under the Rule. But if Andrew Baker conveys to John Stiles and his heirs and John conveys to James Thorpe and his heirs so long as the Penobscot Building shall stand, John retains a possibility of reverter which the American decisions treat as valid and which may become possessory after centuries. Why the law should forbid one and permit the other is difficult to see. Indeed, the possibility of re-

111 N.W. 757 (1907); *Puffer v. Clark*, 202 Mich. 169, 168 N.W. 471 (1918); *Halpin v. Rural Agricultural School District No. 9*, 224 Mich. 308, 194 N.W. 1005 (1923); *Porter v. Barrett*, 233 Mich. 373, 206 N.W. 532, 42 A.L.R. 1267 (1925), Part One, note 158 *supra*; *Epworth Assembly v. Ludington & Northern Ry.*, 236 Mich. 565, 211 N.W. 99 (1926); *Trustees of the M.J. Clark Memorial Home v. Jewell*, 240 Mich. 250, 215 N.W. 378 (1927); *Weber v. Ford Motor Co.*, 245 Mich. 213, 222 N.W. 198 (1928); *Village of Grosse Pointe Shores v. Ayres*, 254 Mich. 58, 235 N.W. 829 (1931); *Bruce v. Henry Ford Hospital*, 254 Mich. 394, 236 N.W. 813 (1931); *Quinn v. Pere Marquette Ry. Co.*, 256 Mich. 143, 239 N.W. 376 (1931); *Rhines v. Consumers' Power Co.*, 259 Mich. 236, 242 N.W. 898 (1932); *Briggs v. City of Grand Rapids*, 261 Mich. 11, 245 N.W. 555 (1932); *Avery v. Consumers' Power Co.*, 265 Mich. 696, 253 N.W. 189 (1934); *Ford v. City of Detroit*, 273 Mich. 449, 263 N.W. 425 (1935); *Dolby v. State Highway Commissioner*, 283 Mich. 609, 278 N.W. 694 (1938); *Juif v. State Highway Commissioner*, 287 Mich. 35, 282 N.W. 892 (1938); *Central Land Co. v. City of Grand Rapids*, 302 Mich. 105, 4 N.W. (2d) 485 (1942); *Livonia Township School District v. Wilson*, 339 Mich. 454, *sub nom.* *Wayne County v. Wilson*, 64 N.W. (2d) 563 (1954).

³⁴⁷ *Smith v. Barrie*, 56 Mich. 314, 22 N.W. 816 (1885); *Watrous v. Allen*, 57 Mich. 362, 24 N.W. 104 (1885); *Hickox v. Chicago & Canada Southern Ry. Co.*, 78 Mich. 615, 44 N.W. 143 (1889); *Reilly v. Otto*, 108 Mich. 330, 66 N.W. 228 (1896); *Estes v. Muskegon County Agricultural & Driving Park Association*, 181 Mich. 71, 147 N.W. 553 (1914); *Hawkins v. Dillman*, 268 Mich. 483, 256 N.W. 492 (1934).

verter is the more serious indirect restraint on alienation of the two where, as in Michigan, it is probably inalienable³⁴⁸ and so must descend to the heirs of the transferor. Under our system of descent, the heirs of a grantor are likely to be very numerous and very scattered a hundred years after his death. Unless all of them can be found and persuaded to release, the owner of the fee subject to defeasance cannot afford to erect expensive improvements on the land and cannot sell it for an adequate price because the title he has may be cut off at any moment by an event beyond his control. The only possible explanation of this anomalous rule is the historical one that the Rule Against Perpetuities was developed to restrict interests created by virtue of the Statutes of Uses and Wills and that possibilities of reverter and rights of entry were interests known to the common law before the enactment of these statutes.³⁴⁹ This argument has not deterred our courts from applying the Rule to contingent remainders, which were also known to the common law.³⁵⁰ The Michigan Supreme Court has never enforced a possibility of reverter or a right of entry defeating a fee arising from a conveyance which became

³⁴⁸ Part One, note 377 *supra*. Rights of entry on breach of conditions subsequent in conveyances of estates in fee executed before 1931 are also inalienable. Part One, note 374 *supra*.

³⁴⁹ Part Two, notes 338, 344, *supra*. Professor Leach is wont to cite as a horrible example of the tendency of remote possibilities of reverter and rights of entry to prevent the development and use of land, a tract in Boston which was conveyed long ago on condition that no building over thirteen feet high ever be erected on it. The probable motive of the grantor was a desire to preserve a view of his cattle grazing in the vicinity. The tract is now in a closely built-up section of the city but the owners dare not erect an appropriate building on it. They cannot secure releases from the heirs of the grantor because these cannot be found. Hence no one can use the land effectively, *CASES AND MATERIALS ON FUTURE INTERESTS* (2d ed.) 50, note 25 (1940); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.62 (1952).

³⁵⁰ Part Two, notes 37, 39, 42, *supra*.

effective at a time when the common-law Rule Against Perpetuities applied to Michigan land. It is, therefore, free to follow the English decisions holding that these interests are subject to the Rule,³⁵¹ and it ought to do so.

A fee simple subject to an easement, a profit à prendre, or a use restriction is a present estate which is vested and not subject to the Rule Against Perpetuities. If John Stiles, owning land in fee simple, grants to James Thorpe and his heirs a right to take oil and gas from his land so long as they can be extracted, John retains a present possessory fee simple which does not violate the Rule although it will become more enjoyable at some remote future time when the oil and gas operations cease.³⁵² In England it is not possible to create a legal easement which entitles the holder to exclusive possession of the servient land, a right to exclusive possession being deemed a possessory estate.³⁵³ Several Michigan cases,

³⁵¹ Part Two, notes 337, 343, *supra*.

³⁵² This was assumed in *McClanahan Oil Co. v. Perkins*, 303 Mich. 448, 6 N.W. (2d) 742 (1942), which involved such a grant.

³⁵³ *Anonymous*, Y.B. 4 Edw. IV, Pasch., pl. 9 (1464); *Rex v. Bell*, 7 T.R. 598, 101 Eng. Rep. 1152 (1798) (exclusive use of way); *Rex v. Bath*, 14 East 609, 104 Eng. Rep. 736 (1811); *Rex v. Rochdale Waterworks*, 1 M.&S. 634, 105 Eng. Rep. 237 (1813); *Rex v. Birmingham Gas-Light & Coke Co.*, 1 B.&C. 506, 107 Eng. Rep. 187 (1823); *Rex v. Brighton Gas Light & Coke Co.*, 5 B.&C. 466, 108 Eng. Rep. 173 (1826); *Rex v. Chelsea Water Works*, 5 B.&Ad. 156, 110 Eng. Rep. 750 (1833); *Regina v. East London Waterworks*, 18 Q.B. 705, 118 Eng. Rep. 266 (1852); *Electric Telegraph Co. v. Overseers of Salford*, 11 Ex. 181, 156 Eng. Rep. 795 (1855); *Taylor v. Corporation of St. Helens*, 6 Ch. D. 264 (C.A. 1877) (exclusive use of an artificial watercourse); *Lancashire & Cheshire Telephone Exchange Co. v. Manchester*, 14 Q.B.D. 267 (C.A. 1884); *Reilly v. Booth*, 44 Ch. D. 12 (C.A. 1889) (exclusive use of a passage); *Bevan v. London Portland Cement Co., Ltd.*, 67 L.T. 615 (1892); *Metropolitan Ry. Co. v. Fowler*, [1893] A.C. 416 (exclusive use of tunnel); *Assessment Committee of Holywell Union v. Halkyn District Mines Drainage Co.*, [1895] A.C. 117 (H.L. 1894) (this and the other cases not specially noted involved public utility pipe or pole lines); *Sweet, "The 'Easement' of Tunnelling,"* 32 L.Q.R. 74 at 79 (1916). Accord: *Dyce v. Hay*, 1 Macqueen 305 (H.L., Scotland, 1852). See: *Potter v. North*, 1 Lev. 268, 83 Eng. Rep. 400 (1669).

however, have treated conveyances of rights of exclusive possession and control, particularly to railroad companies, as grants of easements.³⁵⁴ If John Stiles grants to the Detroit, Lansing, and Northern Railroad Company "an easement of right of way, with the right to exclusive possession, control and enjoyment, so long as used for railroad purposes," the railroad takes, under English law, a possessory fee simple on special limitation, and John's retained interest is a possibility of reverter. Under Michigan law it would seem that the railroad takes only an easement and John retains the present fee simple subject to the easement, not a mere possibility of reverter.³⁵⁵ Yet his right to possession is contingent upon a remote future event.

³⁵⁴ *Jones v. Van Bochove*, 103 Mich. 98, 61 N.W. 342 (1894); *Matthews v. Lake Shore & Michigan Southern Ry. Co.*, 110 Mich. 170, 67 N.W. 1111 (1896); *Mahar v. Grand Rapids Terminal R. Co.*, 174 Mich. 138, 140 N.W. 535 (1913); *Engleman v. City of Kalamazoo*, 229 Mich. 603, 201 N.W. 880 (1925) (exclusive right to use a stairway); *McClintic-Marshall Co. v. Ford Motor Co.*, 254 Mich. 305, 236 N.W. 792 (1931) (exclusive right to construct and use a tunnel); *Michigan Central R.R. Co. v. Garfield Petroleum Corp.*, 292 Mich. 373, 290 N.W. 833 (1940); *Gardens of Rest, Inc. v. Upper Michigan Power & Light Co.*, 322 Mich. 153, 33 N.W. (2d) 741 (1948) (exclusive right to maintain a power line; the other cases involve railroad rights of way). See: Annotation, "Deed to Railroad Company as Conveying Fee or Easement," 132 A.L.R. 142 (1941). But in *Croucher v. Wooster*, 271 Mich. 337, 260 N.W. 739 (1935), a grant of the use of land for residence purposes forever was held to convey a possessory estate in fee simple.

³⁵⁵ *Mahar v. Grand Rapids Terminal R. Co.*, 174 Mich. 138, 140 N.W. 535 (1913). See: *Wanzer v. Blanchard*, 3 Mich. 11 (1853); *Thayer v. McGee*, 20 Mich. 195 (1870). In reality our Supreme Court has created a new fiction, analogous to the English fiction that an owner in fee simple subject to an outstanding long-term lease has a present possessory estate. Part Two, note 330 *supra*. Such a development is remarkable in view of the evident intention of our statutes to abolish the English fiction and to make every estate "where the right to the possession is postponed to a future period" an estate in expectancy. Rev. Stat. 1846, c. 62, §8, Comp. Laws (1857) §2592, Comp. Laws (1871) §4075; Comp. Laws (1897) §8790; How. Stat., §5524; Comp. Laws (1915) §11526; Comp. Laws (1929) §12928; Mich. Stat. Ann., §26.8; Comp. Laws (1948) §554.8. See Part Two, notes 179, 330, *supra*.

The American exemption of possibilities of reverter and rights of entry on breach of condition subsequent from the Rule Against Perpetuities does not appear to extend to any other type of contingent future interest in property retained by or created in a transferor under the terms of the instrument of transfer. Thus it would seem that a reserved power of revocation³⁵⁶ or power of appointment³⁵⁷ and the possibility of being an appointee under a power of appointment³⁵⁸ created by the instrument are subject to the Rule to the same extent that interests limited to persons other than the transferor are so subject. So is a reserved option to repurchase which would be specifically enforceable if valid.³⁵⁹

³⁵⁶ Foulke, "Powers and the Rule Against Perpetuities," 16 COL. L. REV. 627 at 644 (1916). A power of revocation exercisable only by the transferor personally would not violate the Rule because it could not be exercised beyond a life in being. See Part Two, note 296 *supra*. But a power of revocation reserved to the transferor and his heirs, exercisable only upon a remote condition precedent would, it is believed, offend the Rule. It is noteworthy that the only future interests retained by or created in a transferor which the American decisions exempt from the Rule Against Perpetuities are those which were recognized at common law before the enactment of the Statutes of Uses and Wills. Powers were a creation of equity and acquired recognition at common law only by virtue of these statutes. An option is an interest in property only by virtue of the equitable doctrine of specific performance of contracts.

³⁵⁷ A power of appointment exercisable only by the transferor personally would not offend the Rule because it could not be exercised beyond a life in being. Part Two, notes 296, 298, *supra*. But a power of appointment reserved to the transferor and his heirs, exercisable only upon a remote condition precedent, would seem to violate the Rule. For example, if Andrew Baker conveys land to John Stiles and his heirs "but if the descendants of John ever become extinct, to such person as the grantor or his heirs may appoint."

³⁵⁸ PROPERTY RESTATEMENT, §372, *Comment a.* (1944). For example, if John Stiles conveys land "to such persons as Andrew Baker may appoint and until and in default of appointment to James Thorpe and his heirs" and Andrew Baker appoints "to John Stiles and his heirs if the descendants of James Thorpe ever become extinct."

³⁵⁹ London & South Western Ry. Co. v. Gomm, 20 Ch. D. 562 (1882); PROPERTY RESTATEMENT, §394 (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.56 (1952).

B. CONTRACTS, OPTIONS, AND MORTGAGES

The Rule Against Perpetuities is a part of the law of property. It has no application to contracts which do not create interests in property.³⁶⁰ If the Iosco Life In-

An option to repurchase stock in a closed corporation, probably limited in duration to the life of the transferor-optionee, was enforced in *Halsey v. Boomer*, 236 Mich. 328, 210 N.W. 209, 48 A.L.R. 622 (1926). The validity of an option to repurchase land, given in 1838 for a term of fifteen years, was assumed in *Swetland v. Swetland*, 3 Mich. 482 (1855). As the common-law Rule Against Perpetuities did not apply to limitations of interests in land made between March 1, 1847, and September 22, 1949 [Part Two, note 50 *supra*], decisions relative to the validity of options to repurchase given during that period are not precedents as to the application of the Rule. In a number of cases options to repurchase land given during that period, limited in duration to twenty-one years or less, were enforced or assumed to be valid. *Cornell v. Hall*, 22 Mich. 377 (1871); *Daniels v. Johnson*, 24 Mich. 430 (1872); *Stahl v. Dehn*, 72 Mich. 645, 40 N.W. 922 (1888); *Reed v. Bond*, 96 Mich. 134, 55 N.W. 619 (1893); *Abbott v. Gruner*, 121 Mich. 140, 79 N.W. 1065 (1899); *Blumberg v. Beekman*, 121 Mich. 647, 80 N.W. 710 (1899); *City Lumber Co. v. Hollands*, 181 Mich. 531, 148 N.W. 361 (1914); *Gogarn v. Connors*, 188 Mich. 161, 153 N.W. 1068 (1915); *McFadden v. Huron Valley Building and Savings Association*, 255 Mich. 659, 239 N.W. 322 (1931); *Beecher v. Morse*, 286 Mich. 513, 282 N.W. 226 (1938). As such options could not have been exercised beyond the period of the Rule Against Perpetuities, they would not have violated the Rule if it had been in force. In *Livonia Township School District v. Wilson*, 339 Mich. 454, *sub nom.* *Wayne County v. Wilson*, 64 N.W. (2d) 563 (1954), a reserved option in a 1944 deed to repurchase for \$80 if, within 25 years, the land should not be used for school purposes, was treated as valid. The validity of a perpetual pre-emptive option to repurchase land was assumed in *Stony Pointe Peninsula Association v. Broderick*, 321 Mich. 124, 32 N.W. (2d) 363 (1948), Part One, note 233 *supra*, and there is dictum to the effect that an option of this type would be valid in *Smith v. Barrie*, 56 Mich. 314 at 317, 22 N.W. 816 (1885), Part One, note 230 *supra*. Such an option reserved in a conveyance executed since September 23, 1949, should be deemed void both as a direct restraint on alienation and as violating the Rule Against Perpetuities.

³⁶⁰ *Walsh v. Secretary of State for India*, 10 H.L.C. 367, 11 Eng. Rep. 1068 (1863); *Witham v. Vane*, (H.L. 1883), reported in Challis, *LAW OF REAL PROPERTY*, 3rd ed., 440 (1911). Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §329 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §513 (1936); *PROPERTY RESTATEMENT*, §401 (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.58 (1952). Professors Gray and Simes suggest that the Rule does apply to a transfer of rights created by contract, such as a bequest by the obligee on a remote contingency.

insurance Company, in consideration of being designated beneficiary under a \$100,000 insurance policy on the life of John Stiles, contracts with John that it will pay \$3,000 per annum to the eldest son of John for life, to the eldest son of such eldest son for life, and to the eldest son in each successive generation forever, in like manner, it would seem that the contract is valid ³⁶¹ although such a perpetual succession of life interests, if limited as interests in property, whether legal or under a trust, would be void.

An option to purchase property is a contract right to purchase which is always subject to at least two conditions precedent, notification of election to purchase and payment of the purchase price. Irrevocable options to purchase land and unique chattels are specifically enforceable in equity. Consequently such an option, to the extent that it is valid for that purpose, is a limitation of a contingent equitable future interest in the property involved. The decisions in England and this country are uniform in holding that options, insofar as they are limitations of contingent future interests in property, are subject to the Rule Against Perpetuities.³⁶² In England an option, in its purely contract aspects, is not subject to the Rule, and therefore, even though it may under its terms be exercised at some time beyond the period of the Rule, it may be enforced against the original optionor either by an action for damages for breach or, if the original optionor still owns the property, by a suit

³⁶¹ See: *Holmes v. John Hancock Mutual Life Insurance Co.*, 288 N.Y. 106, 41 N.E. (2d) 909 (1942); PROPERTY RESTATEMENT, §401, Ill. 2. (1944).

³⁶² *London & South Western Ry. Co. v. Gomm*, 20 Ch. D. 562 (1882); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §330 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §512 (1936); PROPERTY RESTATEMENT, §§393, 394 (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.56 (1952).

for specific performance.³⁶³ In this country an option which would otherwise be specifically enforceable and which, under its terms, might be exercised at a time beyond the period of the Rule Against Perpetuities, is wholly void and cannot be enforced in any way either against the original optionor or against a subsequent purchaser.³⁶⁴ If Andrew Baker, owning land in fee simple, contracts with John Stiles to convey it to John, his heirs or assigns, upon notice and payment of \$10,000 at any time within forty years, the contract is void.

An option given to someone who has no other interest in the land is a very severe indirect restraint on alienation and development. Neither the optionor nor anyone who acquires the land can afford to expend money on improvements while his title remains subject to defeasance by the exercise of the option. An option given to a lessee under a long-term lease does not have the same restraining effect. It increases the value and improves the salability of the lessee's estate and encourages him to make valuable improvements, since by exercise of the option he may extend the duration of his possession. In England options in leases, entitling the lessee to renew, are not subject to the Rule Against Perpetuities even though they permit perpetual renewal,³⁶⁵ but an option to purchase the fee is subject to the Rule, even

³⁶³ *Worthing Corporation v. Heather*, [1906] 2 Ch. 532 (damages); *Hutton v. Watling*, [1948] Ch. 26 (specific performance); Cheshire, *MODERN LAW OF REAL PROPERTY*, 6th ed., 505 (1949).

³⁶⁴ *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N.E. 177 (1919); 2 Simes, *LAW OF FUTURE INTERESTS*, §512 (1936); *PROPERTY RESTATEMENT*, §393, *Comment h*, §394, *Comment e*. (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.56 (1952); Annotation: 162 A.L.R. 581 (1946). See: Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §330c (1915); Cf. §330a.

³⁶⁵ *Rider v. Ford*, [1923] 1 Ch. 541; Cheshire, *MODERN LAW OF REAL PROPERTY*, 6th ed., 505 (1949).

though given to a lessee under a long-term lease.³⁶⁶ In this country options given to a lessee, exercisable only during the term of the lease, whether to renew³⁶⁷ or to purchase the fee,³⁶⁸ are exempt from the Rule Against Perpetuities. If Andrew Baker, owning land in fee simple, leases it to John Stiles, his executors, administrators, and assigns for 99 years, with options in the lessee to renew forever on the same terms and to purchase at any time at a price to be determined by arbitrators at the time of exercise, both options are valid.

*Windiate v. Lorman*³⁶⁹ was a suit to remove a cloud from title. In 1910 the plaintiff, John Windiate, executed an instrument providing,

"If I ever desire to sell, or if my heirs or devisees shall ever desire to sell [certain lands], I will give to Janette Lorman, her heirs, devisees and assigns the first opportunity to buy the said land at the best price, not to exceed \$1,000, which I can get for it from anyone else - - and

³⁶⁶ Woodall v. Clifton, [1905] 2 Ch. 257; Cheshire, MODERN LAW OF REAL PROPERTY, 6th ed., 504 (1949).

³⁶⁷ Gray, RULE AGAINST PERPETUITIES, 3rd ed., §230 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §511 (1936); PROPERTY RESTATEMENT, §395 (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.57 (1952); Annotations, 3 A.L.R. 498 (1919), 162 A.L.R. 1147 (1946).

³⁶⁸ 2 Simes, LAW OF FUTURE INTERESTS, §512 (1936); PROPERTY RESTATEMENT, §395 (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.67 (1952); Annotation: 162 A.L.R. 581 at 599 (1946). But see: Gray, RULE AGAINST PERPETUITIES, 3rd ed., §230b (1915).

³⁶⁹ 236 Mich. 531, 211 N.W. 62 (1926). In Livonia Township School District v. Wilson, 339 Mich. 454, *sub nom.* Wayne County v. Wilson, 64 N.W. (2d) 563 (1954), a provision in a 1944 deed giving the grantor an option to repurchase for \$80 if, within 25 years, the land should not be used for school purposes, was treated as valid. In Braun v. Klug, 335 Mich. 691, 57 N.W. (2d) 299 (1953), land was conveyed in fee simple subject to a covenant against sale to anyone but the grantors or their heirs. A decree holding the provision void as a direct restraint on alienation but giving the grantors a pre-emptive option to repurchase, to which the grantees did not object, was affirmed. As to whether a pre-emptive option is a direct restraint on alienation see Part One, at notes 226-231, *supra*.

upon payment or tender of such price by her, her heirs or assigns, to me, my heirs and devisees, that the land shall be conveyed to her, her heirs or assigns, in fee simple - - -."

The plaintiff, at a time when the land was worth some \$8,000, sought a declaration that this option was void under the Rule Against Perpetuities. An assignee of the optionee intervened as party defendant and filed a cross-bill for specific performance of the option. The Court affirmed a decree for the intervenor, granting specific performance of the option, saying that the common-law Rule Against Perpetuities was not in force in Michigan so far as land was concerned and that the option did not suspend the absolute power of alienation in violation of the statutes then in force.³⁷⁰ Subsequently

³⁷⁰ Accord as to the latter point: *Matter of City of New York*, 246 N.Y. 1, 549, 157 N.E. 911, 159 N.E. 646 (1927), *cert. den.*, 276 U.S. 603 (1928); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶12, Ch. B, ¶53 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.9 (1952). Both the New York and Michigan courts were influenced in reaching this conclusion by the fact that the suspension of the absolute power of alienation statutes [Part Two, note 47 *supra*], unlike the common-law Rule Against Perpetuities, allowed no period in gross. Hence, if any option contravened the statutes, an option exercisable for any period, even a single day, not based on human lives, would be void. There are numerous decisions enforcing or assuming the validity of options to purchase land given between March 1, 1847, and September 22, 1949, when these statutes applied to disposition of land and the common-law Rule Against Perpetuities did not [Part Two, note 50 *supra*], exercisable for periods in gross of less than twenty-one years. *Curran v. Rogers*, 35 Mich. 221 (1876); *Wilcox v. Cline*, 70 Mich. 517, 38 N.W. 555 (1888); *Mier v. Hadden*, 148 Mich. 488, 111 N.W. 1040 (1907); *Cameron v. Shumway*, 149 Mich. 634, 113 N.W. 287 (1907); *Van Deusen v. Brown*, 167 Mich. 49, 132 N.W. 472 (1911); *Weadock v. Champe*, 193 Mich. 553, 160 N.W. 564 (1916); *George v. Schuman*, 202 Mich. 241, 168 N.W. 486 (1918); *Wayne Woods Land Co. v. Beeman*, 211 Mich. 360, 178 N.W. 696 (1920); *Cooper v. Pierson*, 212 Mich. 657, 180 N.W. 351 (1920); *Jacob v. Cummings*, 213 Mich. 373, 182 N.W. 115 (1921); *Olson v. Sash*, 217 Mich. 604, 187 N.W. 346 (1922); *Jefferson Land Co. v. Kamowski*, 233 Mich. 210, 206 N.W. 351 (1925); *Ludwig v. Hall*, 234 Mich. 478, 208 N.W. 436 (1926); *Sulzberger v. Steinhauer*, 235 Mich. 253, 209 N.W. 68 (1926);

John Windiate's widow sued for admeasurement of her dower in the optioned land, joining as a defendant Frank Tyack, who claimed to have an interest as a vendee under a land contract executed by John Windiate in 1920. Tyack, who was not a party to the earlier case, urged the invalidity of the 1910 option. The Court reaffirmed its previous decision that the option was valid, saying,

"Inasmuch as we do not follow the common law on the subject it will not be necessary for us to take up the many English and American cases cited to us by counsel dealing with the common-law rule. - - -

"In *Gray on the Rule Against Perpetuities* (3d Ed.), §329, it is said:

"The rule against perpetuities concerns rights of property only, and does not affect the making of contracts which do not create rights of property.' " ³⁷¹

Tromley v. Lange, 236 Mich. 240, 210 N.W. 202 (1926); *Rashken v. Smith*, 236 Mich. 440, 210 N.W. 485 (1927); *Beardslee v. Grindley*, 236 Mich. 453, 210 N.W. 486 (1926); *Clark v. Muirhead*, 245 Mich. 49, 222 N.W. 79 (1928); *O'Toole & Nedeau Co. v. Boelkins*, 254 Mich. 44, 235 N.W. 820 (1931); *Danto v. Kunze*, 255 Mich. 135, 237 N.W. 390 (1931); *Stevens v. Stott*, 270 Mich. 637, 259 N.W. 157 (1935); *Thomas v. Ledger*, 274 Mich. 16, 263 N.W. 783 (1936); *State v. Owen*, 312 Mich. 73, 19 N.W. (2d) 491 (1945); *Bergman v. Dykhous*, 316 Mich. 315, 25 N.W. (2d) 210 (1946); *Le Baron Homes, Inc. v. Pontiac Housing Fund, Inc.*, 319 Mich. 310, 29 N.W. (2d) 704 (1947); *Deane v. Rex Oil & Gas Co.*, 325 Mich. 625, 39 N.W. (2d) 204 (1949). See also cases cited in Part Two, notes 359 *supra*, 372, 373, *infra*. In *Digby v. Thorson*, 319 Mich. 524, 30 N.W. (2d) 266 (1948) an option to purchase land, exercisable for two lives in being, was enforced. As such options could not have been exercised beyond the period of the common-law Rule Against Perpetuities, they would not have violated the Rule if it had been in force. In *Caughey v. Ames*, 315 Mich. 643, 24 N.W. (2d) 521 (1946) an option to purchase land without a stated time limitation was construed to be exercisable only for a reasonable time. As a reasonable time would be less than twenty-one years, such an option would not have violated the Rule if it had been in force as to land. In *Bohnsack v. Detroit Trust Co.*, 292 Mich. 167, 290 N.W. 367 (1940), an option to purchase stock in a closed corporation, exercisable during the lives of named persons, was enforced. This option, as it related to unique chattels personal, was subject to the Rule Against Perpetuities but did not violate it.

³⁷¹ *Windiate v. Leland*, 246 Mich. 659 at 663 and 665, 225 N.W. 620 (1929).

If this language quoted from Professor Gray's treatise is to be considered dictum that options are not subject to the common-law Rule Against Perpetuities, it should be read in the light of the following section of that treatise, which asserts positively that specifically enforceable options are subject to the Rule. Options to purchase land given since September 23, 1949, when the common-law Rule Against Perpetuities came into force as to land, should be deemed subject to the Rule here as elsewhere.

The Michigan Supreme Court has frequently enforced or assumed the validity of options to purchase³⁷² and to renew a single time³⁷³ in leases for terms of less

³⁷² *Gustin v. Union School District of Bay City*, 94 Mich. 502, 54 N.W. 156 (1893); *Wright v. Kaynor*, 150 Mich. 7, 113 N.W. 779 (1907); *Mentlikowski v. Wisniewski*, 173 Mich. 642, 139 N.W. 874 (1913); *Agar v. Streeter*, 183 Mich. 600, 150 N.W. 160 (1914); *Bushman v. Faltis*, 184 Mich. 172, 150 N.W. 848 (1915) (granting specific performance of a contract to give a 99-year lease containing an option to purchase exercisable for ten years); *Nowicki v. Kopelczak*, 195 Mich. 678, 162 N.W. 266 (1917); *Polczynski v. Nowicki*, 227 Mich. 415, 198 N.W. 976 (1924); *Meadow Heights Country Club v. Hinckley*, 229 Mich. 291, 201 N.W. 190 (1924); *Hake v. Groff*, 232 Mich. 233, 205 N.W. 145 (1925); *Hafeli Bros. Corp. v. Bon*, 273 Mich. 525, 263 N.W. 733 (1935); *Nu-Way Service Stations, Inc. v. Vandenberg Oil Co.*, 283 Mich. 551, 278 N.W. 683 (1938); *Berrien County Fruit Exchange, Inc. v. Pallas*, 314 Mich. 66, 22 N.W. (2d) 74 (1946); *Brenner v. Duncan*, 318 Mich. 1, 27 N.W. (2d) 320 (1947); *Starr v. Holck*, 318 Mich. 452, 28 N.W. (2d) 289 (1947); *Mathieu v. Wubbe*, 330 Mich. 408, 47 N.W. (2d) 670 (1951); *Dyksterhouse v. Ohl*, 330 Mich. 599, 48 N.W. (2d) 122 (1951); *Rosenthal v. Shapiro*, 333 Mich. 302, 52 N.W. (2d) 859 (1952); *Holt v. Stofflet*, 334 Mich. 272, 54 N.W. (2d) 593 (1952), 338 Mich. 115, 61 N.W. (2d) 28 (1953).

³⁷³ *Brown v. Parsons*, 22 Mich. 24 (1870); *Brand v. Frumveller*, 32 Mich. 215 (1875); *Pickard v. Kleis*, 56 Mich. 604, 23 N.W. 329 (1885); *Starkey v. Horton*, 65 Mich. 96, 31 N.W. 626 (1887); *Wright v. Kaynor*, 150 Mich. 7, 113 N.W. 779 (1907); *Chittenden v. Western Union Telegraph Co.*, 154 Mich. 1, 117 N.W. 548 (1908); *Meadow Heights Country Club v. Hinckley*, 229 Mich. 291, 201 N.W. 190 (1924); *Stern Co. v. Friedman*, 229 Mich. 623, 201 N.W. 961 (1925); *King-Blair Co. v. Schloss*, 253 Mich. 243, 234 N.W. 481 (1931); *Maas Bros., Inc. v. Weitzman*, 288 Mich. 625, 286 N.W. 104 (1939); *Berrien County Fruit Exchange, Inc. v. Pallas*, 314 Mich. 66, 22 N.W. (2d) 74 (1946); *Mansour v. Hyman Winegarden Realty Corp.*, 314 Mich. 262, 22 N.W.

than twenty-one years given between 1847 and 1949, when the Rule Against Perpetuities was not in force as to limitations of land. Such options would not, of course, have violated the Rule even if it had been in force and if it extended to options in leases.³⁷⁴ *Stender v. Kerreos*³⁷⁵ was a summary proceeding for possession of land. Mrs. Cady leased the land to the defendants for three years from August 1, 1904, by a lease providing,

"And the said parties of the second part at the end of the said three years may have the privilege of renewing this lease at the same rental for so long a term as said parties of the second part may see fit, upon the same terms and conditions as in this lease contained, with this exception: That on and after three years from said August 1, 1904, the said party of the first part shall have the privilege of entering and occupying said premises and terminating said lease, in case she wishes to rebuild upon said premises, upon giving said parties of the second part sixty (60) days' notice in writing of such intention; - - -."

The plaintiff purchased the reversion from Mrs. Cady, and on May 29, 1907, served the defendants with a notice

(2d) 366 (1946); *Laevin v. St. Vincent de Paul Society of Grand Rapids*, 323 Mich. 607, 36 N.W. (2d) 163 (1949); *Mathieu v. Wubbe*, 330 Mich. 408, 47 N.W. (2d) 670 (1951); *Gurunian v. Grossman*, 331 Mich. 412, 49 N.W. (2d) 354 (1951); *Rosenthal v. Shapiro*, 333 Mich. 302, 52 N.W. (2d) 859 (1952).

³⁷⁴ But they would have violated the statutes prohibiting suspension of the absolute power of alienation for more than two lives if options were deemed to suspend the absolute power of alienation because the statutes permitted no period in gross. Part Two, note 370 *supra*. Moreover, in *Toms v. Williams*, 41 Mich. 552, 2 N.W. 814 (1879), it was assumed that a provision in a forty-year lease that the lessor would either pay for the tenant's improvements or grant a renewal lease for forty years at the end of the term was valid.

³⁷⁵ 156 Mich. 499, 121 N.W. 258 (1909). *Grenier v. Cota*, 92 Mich. 23, 52 N.W. 77 (1892), involved a lease for seven months with "first privilege to keep said building for a longer term." The Court, having determined that the lessees had estopped themselves to exercise the option for renewal, found it unnecessary to consider the validity or effect of the quoted language.

to quit on August 1, 1907, which did not state that the plaintiff intended to rebuild. On July 27, 1907, the defendants notified the plaintiff that they elected to renew the lease for fifty years from August 1, 1907. A judgment for the plaintiff was affirmed. All members of the Court agreed that the option to renew the lease for an indefinite term was valid and that it could not be cut off unless the reversioner actually intended to rebuild. The majority deemed the notice to quit a sufficient manifestation of such an intention. Three justices dissented on the ground that it was not. The dissenting opinion, in the course of an argument that the option to renew was valid, stated,

"If they had nominated a term, the length of which, if originally agreed upon, would have violated the rule against perpetuities, a different question would be presented. They did no such thing. It will not be presumed that it was the intention of either party that a perpetuity was to be created, nor should the contract receive the construction that under its terms one might be created." ³⁷⁶

The meaning of this passage escapes the present writer.

Gould v. Harley ³⁷⁷ was a suit to construe a lease. On

³⁷⁶ 156 Mich. 499 at 508.

³⁷⁷ 215 Mich. 234, 183 N.W. 705 (1921). *Brush v. Beecher*, 110 Mich. 597, 68 N.W. 420 (1896), involved leases for terms of five years providing that, at the expiration of the term, the lessor might elect to purchase buildings erected by the lessee and that, if he did not so elect, the lease would be extended for five years, with like provision for election and extension at the expiration of each extension. After the lessee's death the lessor attempted to treat the leases as being perpetually renewable. It was held that as they only purported to bind the parties, their executors, administrators and assigns, not their heirs, the renewal provisions were limited to the joint lives of the parties. The opinion suggested that if the provisions called for perpetual renewal at the option of the lessor, they would probably be void as against public policy because of their tendency to restrict alienation and development. This public policy must be something other than the statutes prohibiting suspension of the absolute power

January 12, 1898, land was leased to the defendants for a term of ten years, "with the privilege of renewing said lease at the pleasure of said second parties." The defendants elected to renew for ten years in 1908 and notified the lessor in 1918 of their intention to renew for an additional ten years, which renewal the reversioner resisted. The trial court entered a decree for the defendants, holding that they had a perpetual option to renew the lease every ten years forever. The Supreme Court reversed, holding that, as a matter of construction, the option was limited to a single ten-year renewal. The opinion states that provisions for perpetual renewal are not favored and will not be found unless the language is clear and a provision that the renewal lease shall contain the same terms as the original does not include the renewal provision. These decisions are not authority as to the validity of options for perpetual renewal under the common-law Rule Against Perpetuities, but there is no reason to believe that the Court will deviate from its constructional preference against such options in cases governed by the Rule. That this is so is indicated by the recent case of *Rex Oil & Gas Company v. Busk*,³⁷⁸ where an option to purchase oil extracted from designated land, created by a contract of December 9, 1949, which expressed no time limit, was construed to be operative only for a reasonable time, not perpetually. The Court did not discuss the validity under the Rule

of alienation and the common-law Rule Against Perpetuities, because all that could be renewed against the lessee's objection would be his obligation to pay rent, and a contingent obligation to pay money is not subject to either the statutes or the common-law Rule.

³⁷⁸ 335 Mich. 368, 56 N.W. (2d) 221 (1953). As this option was not contained in a lease it should have been deemed, if perpetual, to violate the Rule Against Perpetuities. Part Two, note 364 *supra*. Accord, as to the proposition that options without time limits will be construed to be limited to a reasonable time: *Caughey v. Ames*, 315 Mich. 643, 24 N.W. (2d) 521 (1946), Part Two, note 370 *supra*.

Against Perpetuities of an option which is perpetual.

The common-law mortgage took the form of a conveyance by the mortgagor to the mortgagee, in fee or of some lesser estate, upon condition that if the mortgagor should repay the mortgage debt by the due date, he or his heirs might re-enter and terminate the estate of the mortgagee.³⁷⁹ As has been seen, by the seventeenth century, the mortgagor, in addition to a right of entry, also had an equity of redemption entitling him to revest title in himself by payment of the debt after the due date.³⁸⁰ Although these are really contingent future interests, they have never been deemed subject to the Rule Against Perpetuities.³⁸¹ Under Michigan law the mortgagor retains a present possessory estate and the mortgagee acquires a lien,³⁸² which is really a beneficial power of appointment exercisable on a future contingency. For the purpose at hand, the relations between the vendor and the vendee under an executory contract for the sale of land are essentially the same. The vendee has a present equitable fee simple and the vendor a nominal legal title which is really only a power of revocation exercisable on a future contingency.³⁸³ So, under our law, the interests of the mortgagee and the land contract vendor are really contingent future estates. Nevertheless, it would seem that they are not subject to the Rule Against Perpetuities.³⁸⁴ That is to say, mortgages and executory

³⁷⁹ Littleton, TENURES, Sec. 332 (1481); Part One, note 667 *supra*.

³⁸⁰ Part One, notes 678-688, *supra*.

³⁸¹ *Knightsbridge Estates Trust, Ltd. v. Byrne*, [1940] A.C. 613; Cheshire, MODERN LAW OF REAL PROPERTY, 6th ed., 505 (1949). See: Gray, RULE AGAINST PERPETUITIES, §§562-571 (1915).

³⁸² Part One, note 704 *supra*.

³⁸³ Part One, notes 693-696, 705, *supra*.

³⁸⁴ See: Gray, RULE AGAINST PERPETUITIES, 3rd ed., §§562-571; Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.63 (1952). A mortgagee's rights may be barred by the statute of limitations, which begins to run at the time of default.

land contracts may be made to run longer than twenty-one years.

The *Restatement of Property* takes the position that a limitation made by a corporation of its own unissued stock or securities is exempt from the Rule Against Perpetuities.³⁸⁵

Albright v. Cobb, 34 Mich. 316 (1876). Although mortgages and land contracts themselves are exempt from the Rule, transfers of interests thereunder are not. Thus a mortgagee could not devise his interest to "my oldest descendant living when the Penobscot Building falls."

³⁸⁵ S. 400 (1944). See: 2 Simes, *LAW OF FUTURE INTERESTS*, §513 (1936). This would include long term options given as security and options to repurchase stock designed to keep the organization "closed". The Michigan Supreme Court has shown some favor to the latter type of arrangement, although it has not been confronted with one which might violate the Rule. *Halsey v. Boomer*, 236 Mich. 328, 210 N.W. 209, 48 A.L.R. 622 (1926); *Bohnsack v. Detroit Trust Co.*, 292 Mich. 167, 290 N.W. 367 (1940); *Barnes Co., Inc. v. Folsinski*, 337 Mich. 370, 60 N.W. (2d) 302 (1953), Part One, note 522 *supra*.

Limitations to charities are partially exempt from the common-law Rule Against Perpetuities. Chapter 15 *infra*.

Trusts and Charities

A. REMOTENESS OF VESTING

IT WILL be recalled that the indestructibility of equitable contingent remainders was one of the reasons for the development of the Rule Against Perpetuities.³⁸⁶ The interests of private beneficiaries of trusts and the interests of private persons following trusts are subject to the Rule to the same extent as any other future interests.³⁸⁷ One aspect of this is the familiar rule of the law of trusts that a trust beneficiary must be certain to be ascertainable within the period of the Rule.³⁸⁸

There are two principal methods of devoting property to charity. One is by transferring it to a charitable corporation for all or some of the purposes permitted by the corporate charter. A transfer of property to a perpetual charitable corporation, as mediaeval lawyers well

³⁸⁶ Part Two, notes 27, 28, 37, *supra*.

³⁸⁷ *Wilson v. Odell*, 58 Mich. 533, 25 N.W. 506 (1885); *Palms v. Palms*, 68 Mich. 355, 36 N.W. 419 (1888); *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924); *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N.W. 703 (1930); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934); *Floyd v. Smith*, 303 Mich. 137, 5 N.W. (2d) 695 (1942); *In re Dingler's Estate*, 319 Mich. 189, 29 N.W. (2d) 108 (1947); *Gray*, RULE AGAINST PERPETUITIES, 3rd ed., §§323-326 (1915); TRUSTS RESTATEMENT, §§62, *Comment k*, 65, *Comment b*. (1925); 1 SCOTT, LAW OF TRUSTS, §62.10 (1939); PROPERTY RESTATEMENT, §370, *Comment p*. (1944). Act. 193, P.A. 1947, §1, amended, Act 61, P.A. 1951, Mich. Stat. Ann., §26.82 (1), Comp. Laws (1948) §555.301, provides that trusts created by an employer for his employees as part of a stock bonus plan, pension plan, disability or death benefit plan, or profit-sharing plan, "shall not be deemed to be invalid as violating the so-called rule against perpetuities, any other existing law against perpetuities or any law restricting or limiting the duration of trusts."

³⁸⁸ TRUSTS RESTATEMENT, §112 (1935).

knew, creates a perpetuity. Hence such transfers have been restricted in England and some American states by what are known as mortmain statutes, and the permissible transferees have been limited by statutes restricting the creation, powers, and purposes of charitable corporations.³⁸⁹ In the absence of applicable statutory restrictions, the only perpetuity problem involved in a transfer of property to a charitable corporation is whether the interest of the corporation is certain to vest within the period of the Rule Against Perpetuities. If the prior interests are non-charitable, a limitation of property to a charitable corporation is subject to the Rule to the same extent as a like limitation to a private person.³⁹⁰ If Andrew Baker devises land to John Stiles in fee simple "but if John's descendants ever become extinct, to the Baker Home for the Aged Poor, Inc.," the shifting executory interest limited to the Home is void under the Rule. Under the English and most American decisions, however, if the prior interests are charitable, such a shifting interest to a charity is excepted from the Rule Against Perpetuities.³⁹¹ If Andrew Baker devises land to the So-

³⁸⁹ 3 Scott, *LAW OF TRUSTS*, §§362.1-362.4 (1939).

³⁹⁰ *Attorney-General v. Gill*, 2 P. Wms. 369, 24 Eng. Rep. 770 (1726); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §594 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §543 (1936); *TRUSTS RESTATEMENT*, §401, *Comment i.* (1935); *PROPERTY RESTATEMENT*, §396 (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.38 (1952). The same is true if there is no preceding interest, i.e., if a springing executory interest is limited by a private person to a charitable corporation.

³⁹¹ *Christ's Hospital v. Grainger*, 16 Sim. 83, 30 Eng. Rep. 804 (1847); *affd.*, 1 Mac. & G. 460, 41 Eng. Rep. 1343 (1848); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§597-603d (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §542 (1936); *TRUSTS RESTATEMENT*, §401, *Comment f.* (1935); *PROPERTY RESTATEMENT*, §397 (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.40 (1952). The same is true if there is no preceding interest and the transferor is itself a charity, i.e., if a springing executory interest is limited by a charitable corporation to another charitable corporation.

ciety for the Prevention of Cruelty to Animals, Inc., "so long as it maintains at least forty free drinking fountains for horses in the City of Boston and when and if it shall cease to do so to the Baker Home for the Aged Poor, Inc.," the shifting executory interest limited to the Home is, under these decisions, valid, although it is not certain to vest within the period of the Rule Against Perpetuities.

The other principal method of devoting property to charity is by the creation of a trust. This, too, has been restricted by statutes of various types.³⁹² In the absence of applicable statutory restrictions, several perpetuities problems arise incident to the creation of a charitable trust because determination of the validity of a trust under the Rule Against Perpetuities involves not only the vesting of the legal estate of the trustee but also that of the equitable interests of the beneficiaries. The problem of the legal estate of the trustee is and is treated the same as that of a limitation to a charitable corporation. If the prior interests are non-charitable, a limitation to a trustee for charitable purposes must be certain to vest, if at all, within the period of the Rule.³⁹³ If Andrew Baker devises land to John Stiles in fee simple "but if John's descendants ever become extinct to James Thorpe and his heirs upon trust to erect and maintain forever a free home for the aged poor," the shifting executory interest limited to James is void under the Rule. Under the English and most American decisions, however, if the prior interests are charitable, such a shifting interest to a charitable trust is excepted from the Rule Against Perpetuities.³⁹⁴ If Andrew Baker devises land to the

³⁹² Part Two, note 389 *supra*.

³⁹³ Part Two, note 390 *supra*.

³⁹⁴ Part Two, note 391 *supra*. The problem here involved can arise in several situations. (1) Limitation to one charitable corporation,

Society for the Prevention of Cruelty to Animals, Inc., "so long as it maintains at least forty free drinking fountains for horses in the City of Boston and when and if it shall cease to do so to James Thorpe and his heirs upon trust to erect and maintain forever a free home for the aged poor," the shifting executory interest limited to James is, under these decisions, valid, although it is not certain to vest within the period of the Rule Against Perpetuities. The interests of the beneficiaries of a charitable trust are, under the English and most American decisions, excepted from the Rule Against Perpetuities.³⁹⁵ Thus a trust to erect and maintain forever a free home for the aged poor is valid, although many of the aged poor who will become beneficiaries will not be ascertainable, and their interests will not vest, for centuries.

Michigan has always recognized the validity of limitations of vested interests in property to charitable corporations. Thus a bequest to an incorporated missionary society,³⁹⁶ church,³⁹⁷ college,³⁹⁸ school board,³⁹⁹ or city⁴⁰⁰

then to another; (2) limitation to a trustee for charity, then to a charitable corporation; (3) limitation to a charitable corporation, then to a trustee for charity; (4) limitation to a trustee for one charity, then to another trustee for another charity; (5) limitation to a trustee to hold forever, first for one charity, then for another; (6) limitation by a charitable corporation to another charitable corporation without a preceding interest; (7) limitation by a charitable corporation to a trustee for charity without a preceding interest. In all these situations it would seem that the interest of the second charity is exempt from the Rule. That is, a particular charitable purpose is treated as an entity for the purpose at hand.

³⁹⁵ TRUSTS RESTATEMENT, §§112, *Comment h.*, 364, 365 (1935). It is sometimes said that the beneficiaries of a charitable trust have no property interest at all and hence there is no equitable interest which could vest at a time beyond the period of the Rule. Gray, RULE AGAINST PERPETUITIES, 3rd ed., §590 (1915); 3 Scott, LAW OF TRUSTS, §364 (1939).

³⁹⁶ American Baptist Missionary Union v. Peck, 10 Mich. 341 (1862); Cook v. Universalist General Convention, 138 Mich. 157, 101 N.W. 217 (1904); Gilchrist v. Corliss, 155 Mich. 126, 118 N.W. 938 (1908).

for all or some of its corporate purposes has always been good. As an unincorporated society cannot hold title to land, a devise to an unincorporated charitable organization is bad, but a direct bequest of personalty to such an organization is good.⁴⁰¹ As the reported cases involved limitations which were not contingent, we lack authority

Cf. *Wheelock v. American Tract Society*, 109 Mich. 141, 66 N.W. 955 (1896); *Sprague v. Trustees of Protestant Episcopal Church*, 186 Mich. 554, 152 N.W. 996 (1915).

³⁹⁷ *Otis v. Arntz*, 198 Mich. 196, 162 N.W. 498 (1917); *Puffer v. Clark*, 202 Mich. 169, 168 N.W. 471 (1918); *Trustees of the M.J. Clark Memorial Home v. Jewell*, 240 Mich. 250, 215 N.W. 378 (1927). See: *Estate of Ticknor*, 13 Mich. 44 (1864).

³⁹⁸ *Allison v. Smith*, 16 Mich. 405 (1868).

³⁹⁹ *Maynard v. Woodard*, 36 Mich. 423 (1877). (Bequest of residue to district school board to hold forever in trust, to use the annual interest for a school library with books "suitable for people of all ages and classes within the said district.") Such a bequest does not create a true trust. Part One, note 221 *supra*.

⁴⁰⁰ *Hatheway v. Sackett*, 32 Mich. 97 (1875); *Hatheway v. Village of New Baltimore*, 48 Mich. 251, 12 N.W. 186 (1882) (bequest to village to erect a high school); *Fitzgerald v. City of Big Rapids*, 123 Mich. 281, 82 N.W. 56 (1900) (devise of land and bequest of money to a city for library); *Hosmer v. City of Detroit*, 175 Mich. 267, 141 N. W. 657 (1913) (devise of land worth \$357,000 and personalty worth \$44,000 to a city to erect a fountain in a public park); *Greenman v. Phillips*, 241 Mich. 464, 217 N.W. 1 (1928) (devise of residue to city to provide park; the Court, unnecessarily, relied on charity statutes cited in Part Two, note 421 *infra*). *Cf.* *Penny v. Croul*, 76 Mich. 471, 43 N.W. 649, 5 L.R.A. 858 (1889) (bequest to trustee to devote the income to maintenance of the library and grounds of the Detroit Water Works). Act 380, P.A. 1913, Comp. Laws (1915) §3301; Comp. Laws (1929) §2746; Mich. Stat. Ann., §5.3421; Comp. Laws (1948) §123.871, provides that grants, devises, and bequests to municipal corporations for public parks, grounds, cemeteries, buildings, or other public purposes, whether made directly or in trust and whether made before or after the enactment of the statute, shall not be invalid for violation of any statute or rule against perpetuities.

⁴⁰¹ *Estate of Ticknor*, 13 Mich. 44 (1864) (bequest to unincorporated charitable society good). Although an unincorporated association cannot hold legal title to land, it can be the beneficiary of a trust of land, and there is a strong tendency in modern cases to construe a direct devise of land to an unincorporated charitable organization as creating a trust for the organization. In *re Schoales*, [1930] 2 Ch. 75, noted, 29 MICH. L. REV. 651 (1931); 3 SCOTT, LAW OF TRUSTS, §397.2 (1939); TRUSTS RESTATEMENT §397, *Comment g.* (1935).

as to the application of the Rule Against Perpetuities to limitations to charitable corporations and societies.

In *Smith v. Bonhoof*,⁴⁰² it was held that a conveyance of land made in 1842 to the Roman Catholic bishop of Detroit, upon trust for an unincorporated congregation, created a valid perpetual trust. The opinion does not mention the Rule Against Perpetuities which, of course, was in force as to limitations of land in 1842.

It will be recalled that Chapter 63 of the Revised Statutes of 1846, which is still in force, limits the purposes for which trusts of land can be created,⁴⁰³ and that provisions of Chapter 62, which were in force from 1847 to 1949, prohibited suspension of the absolute power of alienation of land for more than two lives.⁴⁰⁴ As neither chapter made provision for charitable trusts, these chapters greatly complicated the problem of the validity of charitable trusts involving land. Although neither chapter regulated trusts of chattels personal, the subsequent developments make it desirable to consider the decisions chronologically rather than according to the subject matter involved.

In *Attorney General v. Soule*,⁴⁰⁵ a provision in a will directing the executors to set aside \$10,000 "for the establishment of a school at Montrose aforesaid, for the education of children," was held void as too indefinite to bind the executors to use for a public charity. In *Methodist Episcopal Church of Newark v. Clark*,⁴⁰⁶ a convey-

⁴⁰² 2 Mich. 116 (1851).

⁴⁰³ Part One, notes 583, 586, *supra*.

⁴⁰⁴ Part Two, note 47 *supra*. These provisions were held to limit the duration of trusts of land. Part One, notes 592, 593, *supra*.

⁴⁰⁵ 28 Mich. 153 (1873).

⁴⁰⁶ 41 Mich. 730, 3 N.W. 207 (1897). It was assumed in *Thatcher v. Wardens and Vestrymen of St. Andrew's Church of Ann Arbor*, 37 Mich. 264 (1877), that a remainder to an incorporated church following a trust which offended by its duration the suspension statutes,

ance to trustees upon trust for use as the site of a church forever was held void. The Court said that, as Chapters 62 and 63 of the Revised Statutes of 1846 made no provision for charitable trusts of land, they must conform to the rules for private trusts and were void if they suspended the absolute power of alienation for more than two lives. In *Penny v. Croul*,⁴⁰⁷ a testator devised land to his wife for life, remainder to trustees with directions to convert it into personalty and devote the income forever to maintaining the library and grounds of the Detroit Water Works. It was held that the direction to convert the land into personalty took the disposition out of the suspension of the absolute power of alienation statutes and that, as a trust of personalty for the benefit of a public charitable corporation, it was valid. The Court's opinion, written by Justice Campbell, cited as authority cases involving direct bequests to public corporations⁴⁰⁸ and stated:

"The rule which prevents personal property from being tied up for more than lives in being, and 21 years thereafter, is not a universal rule of common law, but

would be void, and held in *State v. Holmes*, 115 Mich. 456, 73 N.W. 548 (1898) that a remainder to the State which might vest five years after a life in being was void. In *White v. Rice*, 112 Mich. 403, 70 N.W. 1024 (1897), a conveyance of land to an incorporated church, partially upon a potentially perpetual trust for unincorporated religious societies, was held to create a valid trust under a statute enacted after the conveyance involved in *Methodist Episcopal Church of Newark v. Clark* was executed. Act 145, P.A. 1855, §21, Comp. Laws (1857) §2029, Comp. Laws (1871) §3074, How. Stat., §4637, repealed, Act 209, P.A. 1897. This statute expressly authorized conveyances to trustees to hold in perpetuity for religious societies.

⁴⁰⁷ 76 Mich. 471, 43 N.W. 649, 5 L.R.A. 858 (1889). In *Home Missionary Society v. Corning*, 164 Mich. 395, 129 N.W. 686 (1911), the validity of a bequest to trustees to pay the income in perpetuity to the society was assumed.

⁴⁰⁸ *Hatheway v. Sackett*, *Hatheway v. Village of New Baltimore*, Part Two, note 400 *supra*; *Maynard v. Woodward*, Part Two, note 399 *supra*.

one worked out by courts of equity, and it never had any application to charitable or public benefactions. There has never been any incapacity to keep a fund in permanence when there is a public corporation to receive and expend the income.”⁴⁰⁹

The testatrix in *Wheelock v. American Tract Society*⁴¹⁰ devised her lands to her executors in trust “to pay the same” to the society and three other charitable corporations,

“And should my executors think it best to appropriate a portion of the moneys which may come into their hands, which shall not be expended and paid as hereinbefore set forth, - - and as to the amount to be paid, or sums to be distributed, to each, I leave entirely to the judgment and discretion of my executors to act in this respect as they shall think right, - - it is my wish and desire, and they are hereby directed, to pay to such worthy poor girls, to aid in their education, such sums as shall not be expended or paid as hereinbefore provided; - - -”

The Court held that the provision for worthy poor girls was invalid because it was not fully expressed and clearly defined upon the face of the instrument creating it, as required by subsection 5, Section 11, Chapter 63, Revised Statutes of 1846.⁴¹¹ It ruled that the direct devises to the four charitable corporations also failed because they were inseparably connected with the void provision for worthy poor girls. So by the turn of the century it was clear, from *Methodist Episcopal Church of Newark v. Clark*,⁴¹² that charitable trusts of land were subject to the suspension of the absolute power of aliena-

⁴⁰⁹ 76 Mich. 471 at 480.

⁴¹⁰ 109 Mich. 141, 66 N.W. 955 (1896). Testatrix was domiciled in Pennsylvania, but the lands were in Michigan.

⁴¹¹ Part One, notes 583, 586, *supra*.

⁴¹² Part Two, note 406 *supra*.

tion provisions of Chapter 62 of the Revised Statutes, and, from *Wheelock v. American Tract Society*,⁴¹³ that they were subject to the provisions of Chapter 63 governing trusts. As to charitable trusts of chattels personal, *Penny v. Croul*⁴¹⁴ had indicated their validity when the beneficiary was a charitable corporation, and *Smith v. Bonhoof*⁴¹⁵ might indicate that they were valid when the beneficiary was an unincorporated charitable society. *Attorney General v. Soule*⁴¹⁶ had left doubtful the validity of any other type of charitable trust.

In *Hopkins v. Crossley*,⁴¹⁷ the Detroit Volunteer Fire Department, a corporation, dissolved in 1886 and turned over its personalty to three trustees for the relief of poor and needy or disabled members of the old Volunteer Department and their families, of poor, needy, or disabled members of the new paid Fire Department, and of any other needy and worthy persons, and also for the upkeep of firemen's monuments in cemeteries. The Court, after saying that, because no land was involved, Chapters 62 and 63 of the Revised Statutes of 1846 had no application, and that the Rule Against Perpetuities does not apply to a gift to charity, held the trust void. The grounds of this decision are not clear, but it does not seem that the objection to charitable trusts rested on their being perpetuities. Under the law of trusts, the beneficiaries of a trust must be definitely ascertainable persons.⁴¹⁸ Charitable trusts are an exception to this

⁴¹³ Part Two, note 410 *supra*.

⁴¹⁴ Part Two, note 407 *supra*.

⁴¹⁵ Part Two, note 402 *supra*.

⁴¹⁶ Part Two, note 405 *supra*.

⁴¹⁷ 132 Mich. 612, 96 N.W. 499 (1903). In *Hopkins v. Crossley*, 138 Mich. 561, 101 N.W. 822 (1904), it was decided that the fund belonged to the persons who were members of the corporation at its dissolution.

⁴¹⁸ TRUSTS RESTATEMENT, §112 (1935).

rule.⁴¹⁹ *Hopkins v. Crossley* probably amounts to a refusal to accept this exception to the general rule. In any event, several attempts to create charitable trusts were held ineffective under its authority.⁴²⁰

Act 122 of the Public Acts of 1907 provided,

"Section 1. No gift, grant, bequest or devise to religious, educational, charitable or benevolent uses which shall in other respects be valid under the laws of this State, shall be invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities. - - ." ⁴²¹

⁴¹⁹ *Id.*, §112, *Comment h.*, §364 (1935).

⁴²⁰ *McPherson v. Byrne*, 155 Mich. 338, 118 N.W. 985 (1909) (inter vivos trust of personalty for charity, "just as you wish."); *Stoepel v. Satterthwaite*, 162 Mich. 547, 127 N.W. 673 (1910) (bequest to physician "to be used as he sees best for carrying on the work of relieving suffering," void where testatrix died before the effective date of Act 122, P.A. 1907). In *Gilchrist v. Corliss*, 155 Mich. 126, 118 N.W. 938 (1908), a husband who died in 1896 devised the residue of his estate, real and personal, to his wife for life, remainder as to two-thirds to such charities in the City of Alpena as she should by will appoint. The wife, who died in 1905, attempted to exercise the power and also made bequests of her own property to "women's work in foreign fields," "women's work in home lands (not Tank Home)," and "Protestant Missionary work among poor colored people of the South." The Court held that the power created by the husband's will failed because the beneficiaries were not definitely ascertainable, but, on the basis of extrinsic evidence that the church to which she belonged had three organizations devoted to the three objects stated, held that the wife's bequests of her own property were to these organizations and were valid.

⁴²¹ Amended by Act 125, P.A. 1911, to include trusts for the maintenance of parts of cemeteries. Repealed and superseded by Act 280, P.A. 1915, Comp. Laws (1915) §§11099-11101; Comp. Laws (1929) §§13512-13514; Mich. Stat. Ann., §§26.1191-26.1193; Comp. Laws (1948) §§554.351-554.353. Section 1 of the present statute provides, "No gift, grant, bequest or devise, whether in trust or otherwise to religious, educational, charitable or benevolent uses, or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, or anything therein contained which shall in other respects be valid under the laws of this state, shall be invalid by reason of the indefiniteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument

Since the enactment of this legislation there is no doubt that any charitable trust which would be valid under general Anglo-American law is also valid under Michigan law.⁴²² It has been held to exempt charitable

creating the same, nor by reason of the same contravening any statute or rule against perpetuities." Act 373, P.A. 1925, Comp. Laws (1929) §§13516-13517; Mich. Stat. Ann., §§26.1201-26.1202; Comp. Laws (1948) §§554.381, 554.382, provides: "Sec. 1. No statutory or common law rule of this state against perpetuities or restraint of alienation shall hereafter invalidate any gift, grant, devise or bequest in trust or otherwise, for public welfare purposes. Sec. 2. Public welfare purposes are defined to be all lawful purposes beneficial to the public as a whole." See also Act 380, P.A. 1913, Part Two, note 400 *supra*. Trusts created by an employer as part of a stock bonus plan, pension plan, disability or death benefit plan, or profit sharing plan, are exempted from the Rule Against Perpetuities by Act 193, P.A. 1947, as amended by Act 61, P.A. 1951, Mich. Stat. Ann., §26.82 (1), Comp. Laws (1948), §555.301.

⁴²² *Loomis v. Mack*, 183 Mich. 674, 150 N.W. 370 (1915) (Devise of land and personalty on trust for dependent children of Oakland County; decree holding valid affirmed by four to four vote in Supreme Court. The justices voting for reversal thought Act 122 of 1907 was unconstitutional because of a defective title. This doubt was eliminated by Act 125 of 1911); *In re Brown's Estate*, 198 Mich. 544, 165 N.W. 929 (1917), discussed at Part Two, note 428 *infra*; *Peters v. Fowler*, 202 Mich. 695, 168 N.W. 966 (1918), discussed at Part Two, note 427 *infra*; *Scudder v. Security Trust Co.*, 238 Mich. 318, 213 N.W. 131 (1927) (devise of residue to trustee to provide for the welfare of elderly persons without means of support by paying income or principal to organized charities); *Wanstead v. Fisher*, 278 Mich. 68, 270 N.W. 218 (1936) (devise of land to trustee to provide college scholarships to needy graduates of Iron River High School); *John Robinson Hospital v. Cross*, 279 Mich. 407, 272 N.W. 724 (1937) (bequest to trustee to maintain room in hospital); *Gifford v. First National Bank of Menominee*, 285 Mich. 58, 280 N.W. 108 (1938) (devise of residue to trustee to pay income to named persons for life, then to devote to charitable purposes connected with medicine and public health); *Floyd v. Smith*, 303 Mich. 137, 5 N.W. (2d) 695 (1942) (bequest to trustee to construct a hospital in Lapeer); *Chicago Bank of Commerce v. McPherson*, 62 Fed. (2d) 393 (6th Cir. 1932) (devise to trustees for "such charitable, benevolent, educational and public welfare uses as such trustees shall elect"). In *Moore v. O'Leary*, 180 Mich. 261, 146 N.W. 661 (1914), a devise of the residue to "Mary E. Clary, to be disposed of by her as I have heretofore instructed her for charitable purposes" was held void in spite of the statute. Because of the Statute of Wills, such a devise does not create an express charitable trust. There is a conflict of authority in other jurisdictions as to whether a constructive trust for charity will be imposed in this situation. 3 Scott, *LAW OF TRUSTS*, §359 (1939). In *Scarney v. Clarke*,

trusts of land from the suspension of the absolute power of alienation provisions of Chapter 62 of the Revised Statutes of 1846⁴²³ and from the "fully expressed and clearly defined" provision of Chapter 63.⁴²⁴ It will be recalled that, under general Anglo-American law, charities are not wholly exempt from the Rule Against Perpetuities in that a contingent limitation to a charity not preceded by an interest in a charity is subject to the Rule,⁴²⁵ although one which follows another charity is exempt.⁴²⁶ In *Peters v. Fowler*,⁴²⁷ a testator directed his executors to invest \$500 and pay the income to the local Methodist Episcopal church as long as it conducted at least twelve services a year, and when it ceased to do so to pay over the principal to the Board of Foreign Missions of the Methodist Episcopal Church. This was held valid, as it would be in most jurisdictions. *In re Brown's Estate*⁴²⁸ involved a devise of land and personalty to corporations to be organized within two years after probate of the will to operate charitable hospitals. This

282 Mich. 56, 275 N.W. 765 (1937), a trust for a clinic operated for profit was properly held to be non-charitable. Cf. *Auditor General v. R. B. Smith Memorial Hospital Association*, 293 Mich. 36, 291 N.W. 213 (1940), where a non-profit hospital was held charitable although it charged fees.

⁴²³ *Scudder v. Security Trust Co.*, *Wanstead v. Fisher*, cited in preceding note. See Part One, notes 583, 586, Part Two at notes 410, 411, *supra*.

⁴²⁴ *In re Brown's Estate*, Part Two, note 422 *supra*. See Part One, notes 592, 593, Part Two, at notes 47, 406, *supra*.

⁴²⁵ Part Two, note 390 *supra*.

⁴²⁶ Part Two, note 391 *supra*.

⁴²⁷ 202 Mich. 695, 168 N.W. 966 (1918).

⁴²⁸ 198 Mich. 544, 165 N.W. 929 (1917). In *re DeBancourt's Estate*, 279 Mich. 518, 272 N.W. 891, 110 A.L.R. 1346 (1937), involved a bequest to a trustee to pay \$10,000 to the Salvation Army in Jackson "when he is satisfied that the building will be completed and that the said Salvation Army will be able to finance the same." This was treated as valid, but it was held that the Salvation Army would forfeit the bequest if it failed to comply with the condition precedent within ten years, the period of the statute of limitations on claims against decedent's estates.

was held valid although it suspended the absolute power of alienation for a period which might exceed two lives, the maximum period permitted by the statute then in force, and postponed vesting for a period which might exceed lives in being and twenty-one years, the period of the common-law Rule Against Perpetuities.⁴²⁹ This decision appears to mean that in Michigan charities are exempt from the Rule Against Perpetuities in all cases, even when the charitable limitation is contingent and does not follow another charity.

B. DURATION; RESTRAINTS ON TERMINATION

Generally speaking, the common-law Rule Against Perpetuities prohibits only remoteness of vesting, it does not restrict the duration of interests in property, legal or equitable, whether or not they are vested. If Andrew Baker conveys land to John Stiles and his heirs, John takes a legal estate in fee simple which may last forever. If Andrew Baker conveys land to James Thorpe and his heirs upon trust for John Stiles and his heirs, James takes a legal estate in fee simple and John an equitable estate in fee simple. Both of these and the trust itself may last forever, but no violation of the Rule is involved because there is no postponement of vesting.⁴³⁰ A trust does not tie up property or impede alienation undesirably if the interests of the beneficiaries are alienable and they are entitled to terminate the trust by compelling the trustee to convey the legal title to them. Hence, in the absence of statutory restrictions, there is no legal

⁴²⁹ Part Two, note 134 *supra*.

⁴³⁰ *Williams v. Teale*, 6 Hare 239, 67 Eng. Rep. 1155 (1847); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §§232-246 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §557 (1936); *PROPERTY RESTATEMENT*, §378 (1944).

limit to the duration of such trusts.⁴³¹ As has been seen, the Michigan statutes prohibiting suspension of the absolute power of alienation, which were in force from 1847 to 1949, were construed to limit the permissible duration of trusts for receipt of the rents and profits of land, charitable and private, to two lives in being.⁴³² A trust does tie up property and impede alienation undesirably if the beneficiaries are unable to compel termination of the trust, particularly if their interests are inalienable. Hence rules, collateral to the Rule Against Perpetuities, have been developed to restrict limitations which tend to make trusts indestructible for undesirably long periods. The application of these rules is not identical as to all types of indestructible trusts, so separate consideration of the types of trusts which may be indestructible is desirable.

(1) Charitable Trusts

Under general Anglo-American law, a charitable trust may be made perpetually indestructible; that is, it may be so limited that it may last forever and that no one will be entitled to terminate it.⁴³³ Michigan recognized this lack of limitation on the duration of indestructible charitable trusts in *Smith v. Bonhoof*,⁴³⁴ involving a trust of land created before the enactment of the suspension of the absolute power of alienation statutes, and in

⁴³¹ *In re Cassel*, [1926] Ch. 358; 1 Scott, LAW OF TRUSTS, §62.10 (1939).

⁴³² Part One, note 593, Part Two, note 406 *supra*. But these statutes were made inapplicable to charitable trusts by Act 122, P.A. 1907, Part Two, note 421 *supra*.

⁴³³ TRUSTS RESTATEMENT, §365; 3 Scott, LAW OF TRUSTS, §365 (1939); 2 Simes, LAW OF FUTURE INTERESTS, §554 (1936). PROPERTY RESTATEMENT, §§378, 381, 398 (1944); Wolfe, "Rules Against Perpetuities and Gifts to Charity," 17 IND. L.J. 205 (1942).

⁴³⁴ 2 Mich. 116 (1851), Part Two, note 402 *supra*.

Penny v. Croul,⁴³⁵ involving a trust of personalty created before the charities statute of 1907.⁴³⁶ Although charitable trusts of land were limited in duration to two lives by the suspension of the absolute power of alienation statutes,⁴³⁷ it is clear that there has been no restriction on the duration of charitable trusts, whether of land or of personalty and whether or not they are indestructible, since the legislation of 1907.⁴³⁸

(2) Honorary Trusts

A trust which has no ascertainable human beneficiaries but which does have a definite non-charitable purpose is known as an honorary trust.⁴³⁹ The commonly recognized honorary trusts are those for care of graves,⁴⁴⁰ for support of particular animals,⁴⁴¹ and for the promotion of non-charitable causes such as sports⁴⁴² and political parties.⁴⁴³ An honorary trust is not a true trust because the trustee cannot be compelled to carry it out. If he refuses to do so, however, he holds upon resulting trust

⁴³⁵ 76 Mich. 471, 43 N.W. 649, 5 L.R.A. 858 (1889), Part Two, note 407 *supra*.

⁴³⁶ Act 122, P.A. 1907, Part Two, note 421 *supra*.

⁴³⁷ *Methodist Episcopal Church of Newark v. Clark*, 41 Mich. 730, 3 N.W. 207 (1879), Part Two, note 406 *supra*.

⁴³⁸ Part Two, notes 422-424, 426-428, *supra*.

⁴³⁹ TRUSTS RESTATEMENT, §124, *Comment c.* (1935); 1 Scott, LAW OF TRUSTS, §124 (1939).

⁴⁴⁰ *Lloyd v. Lloyd*, 21 L.J. Ch. (N.S.) 596 (1852); *Mussett v. Bingle*, [1876] W.N. 170; 1 Scott, LAW OF TRUSTS, §124.2 (1939).

⁴⁴¹ *Pettingall v. Pettingall*, 11 L.J. Ch. 176 (1842) (favorite black mare); *In re Dean*, 41 Ch. D. 552 (1889) (testator's horses and hounds); *In re Kelly*, [1932] I.R. 255 (testator's dogs); 1 Scott, LAW OF TRUSTS, §124.3 (1939). A trust for the benefit of animals in general, as for the prevention of cruelty to them, is charitable. *In re Marchant*, 54 Sol. J. 425 (1910); TRUSTS RESTATEMENT, §374, *Comment c.* (1935); 3 Scott, *id.*, §374.2.

⁴⁴² *In re Thompson*, [1934] 1 Ch. 342 (fox hunting); 1 Scott, LAW OF TRUSTS, §124.6 (1939).

⁴⁴³ *Bonar Law Memorial Trust v. Inland Revenue Commissioners*, 49 T.L.R. 220 (1933); 3 Scott, LAW OF TRUSTS, §374.6 (1939).

for the settlor or the persons who would have been entitled to the property if there were no trust, usually the heirs or residuary devisees of the settlor. In the absence of provision for its termination in the trust instrument, such a trust is indestructible. The beneficiaries cannot terminate it because there are no ascertainable human beneficiaries, the settlor or his heirs, etc., cannot compel termination, and the trustee cannot terminate the trust for his own benefit. This being so, a rule collateral to the Rule Against Perpetuities has been developed to the effect that an indestructible honorary trust is void unless its duration is certain not to exceed the period of the Rule.⁴⁴⁴ If Andrew Baker bequeaths \$10,000 to John Stiles upon trust to devote the income to the support of Andrew's horses and dogs so long as they live, the bequest is void, because the trust is not certain to terminate within human lives and twenty-one years.⁴⁴⁵

In *Lounsbury v. Trustees of Square Lake Burial Association*,⁴⁴⁶ a testator bequeathed \$100 to the trustees "as a perpetual fund to be kept at interest by said trustees

⁴⁴⁴ Dawson v. Small, L.R. 18 Eq. 114 (1874); Mussett v. Bingle, [1876] W.N. 170; Kennedy v. Kennedy, [1914] A.C. 215; In re Kelly, [1932] I.R. 255; TRUSTS RESTATEMENT, §124 (1935); 2 Simes, LAW OF FUTURE INTERESTS, §555 (1936); 1 Scott, LAW OF TRUSTS, §124.1 (1939); PROPERTY RESTATEMENT, §379 (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.67 (1952); Smith, "Honorary Trusts and the Rule Against Perpetuities," 30 COL. L. REV. 60 (1930).

⁴⁴⁵ It is the generally accepted view that animal lives may not be used to measure the period. In re Estate of Kelly, [1932] I.R. 255; Gray, RULE AGAINST PERPETUITIES, 3rd ed., §§228a, 906 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §491 (1936); PROPERTY RESTATEMENT, §374, *Comment h.* (1944). See Matter of Howells, 145 Misc. 557, 260 N.Y. Supp. 598 (1932). But in In re Dean, 41 Ch. D. 552 (1889), an honorary trust to last for fifty years if the horses who were its beneficiaries so long lived was held valid. Moreover, in In re Estate of Kelly, *supra*, where the trust was to apply £4 annually to the support of certain dogs, it was held that the annual payments were severable and the trust good for twenty-one years.

⁴⁴⁶ 170 Mich. 645, 129 N.W. 36 (1912).

and the interest used to take care of the graves on my lot in said cemetery," and the residue of his estate to his wife for life, remainder to the trustees to erect a fence around the cemetery and a vault in it. The disposition of the residue was held valid, but the provision for a perpetual trust fund was held void as a perpetuity. Since 1911 the Michigan statutes have expressly permitted perpetual trusts for the care of graves,⁴⁴⁷ but the *Lounsbury* case is still authority for the proposition that Michigan recognizes honorary trusts and holds those not authorized by statute invalid if their duration may exceed the period of the Rule Against Perpetuities.

(3) Trusts For Unincorporated Societies

An unincorporated association has capacity to be the beneficiary of a trust.⁴⁴⁸ If the purposes of such an association are charitable, there is no limit to the duration of trusts for it.⁴⁴⁹ If the purposes of an unincorporated association are not charitable, a trust for it is void if, by its terms, it may continue for a period longer than that of the Rule Against Perpetuities and will be indestruc-

⁴⁴⁷ Act 125, P.A. 1911, Act 280, P.A. 1915, Part Two, note 421, Act 380, P.A. 1913, Part Two, note 400 *supra*. See: *In re More's Estate*, 179 Mich. 237, 146 N.W. 319 (1914), where such a trust was held valid by virtue of the provisions of a special act incorporating the cemetery involved.

⁴⁴⁸ TRUSTS RESTATEMENT, §119 (1935); 1 SCOTT, LAW OF TRUSTS, §119 (1939). Such a trust must be distinguished from a trust for the present or future members of a society as individuals, which is a form of class gift.

⁴⁴⁹ PROPERTY RESTATEMENT, §380 (1944); 1 SCOTT, LAW OF TRUSTS, §119 (1939); Part Two, note 433 *supra*; *Smith v. Bonhoof*, 2 Mich. 116 (1851); *Home Missionary Society v. Corning*, 164 Mich. 395, 129 N.W. 686 (1911); *Peters v. Fowler*, 202 Mich. 695, 168 N.W. 966 (1918), Part Two, note 427 *supra*. Of course this was not true as to trusts of Michigan land created between 1847 and 1907. *Methodist Episcopal Church of Newark v. Clark*, 41 Mich. 730, 3 N.W. 207 (1879), Part Two, note 406 *supra*.

tible during that period.⁴⁵⁰ It would seem, however, that a trust for a non-charitable unincorporated association is valid, even though it may continue for a period longer than that of the Rule Against Perpetuities, if some person may destroy it for his own benefit or if the current members of the association may expend the entire principal at any time for the purposes of the association.⁴⁵¹

(4) Indestructible Trusts For Private Persons

In England, if all the beneficiaries of a trust for private persons are in being and ascertained, they are entitled to terminate the trust by compelling the trustee to convey to them even though such termination will defeat a material purpose of the trust.⁴⁵² The rule that trusts for private persons were always destructible by the beneficiaries had, until 1935, a single exception. The interest of the beneficiary of a trust for the separate use of a married woman could be made inalienable and she could be effectively prohibited from terminating the trust prematurely.⁴⁵³ Such a restraint on alienation and

⁴⁵⁰ *Thomson v. Shakespear*, 1 De G.F.&J. 399, 45 Eng. Rep. 413 (1860); *Carne v. Long*, 2 De. G.F.&J. 75, 45 Eng. Rep. 550 (1860); 1 Scott, *LAW OF TRUSTS*, §119 (1939); 2 Simes, *LAW OF FUTURE INTERESTS*, §485 (1936); *PROPERTY RESTATEMENT*, §380 (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.67 (1952).

⁴⁵¹ *In re Drummond*, [1914] 2 Ch. 90; 1 Scott, *LAW OF TRUSTS*, §119 (1939); *PROPERTY RESTATEMENT*, §380 (1944). The *Restatement* deems it sufficient if the trustee or some other person has such power to expend the principal, but this has been questioned. Morray, "The Rule Against Prolonged Indestructibility of Private Trusts," 44 *ILL. L. REV.* 467 at 484 (1949).

⁴⁵² *Saunders v. Vautier*, Cr. & Ph. 240, 41 Eng. Rep. 482 (1841); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §236 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §557 (1936); 3 Scott, *LAW OF TRUSTS*, §337 (1939).

⁴⁵³ *Jackson v. Hobhouse*, 2 Mer. 483, 35 Eng. Rep. 1025 (1817); *Tullett v. Armstrong*, 4 My. & Cr. 377, 41 Eng. Rep. 147 (1840); *Baggett v. Meux*, 1 Ph. 627, 41 Eng. Rep. 771 (1846). The restraints on alienation and termination were effective, however, only while the

termination would endure, of course, only for the life of the married woman concerned. *In re Ridley*⁴⁵⁴ involved a bequest to trustees to pay the income to Mary Cooper for life and then to hold upon trust for the children of Mary who survived her. The will prohibited alienation or anticipation of their interests by female beneficiaries. Mary survived the testator and later died, survived by two married daughters. The daughters sued to compel the trustees to terminate the trust by transferring the principal to them. Such transfer was decreed on the ground that provisions against termination of a trust which might last longer than the period of the Rule Against Perpetuities are void.

Since 1935 England has not permitted indestructible trusts for private persons whether or not they are married women; that is, if all the beneficiaries of such a trust are in being, ascertained and of full age, they may compel the trustee to terminate the trust by transferring the principal to them. In this country, however, it is generally held that the beneficiaries of a trust are not entitled to compel its termination if such termination would defeat a material purpose of the trust.⁴⁵⁵ This doctrine is commonly applied in two situations, where

woman was married, ceasing upon her husband's death. *Jones v. Salter*, 2 Russ. & M. 208, 39 Eng. Rep. 374 (1815); *Barton v. Briscoe*, Jac. 603, 37 Eng. Rep. 978 (1822). The Law Reform (Married Women and Tortfeasors) Act, 1935, 25 and 26 Geo. V, c. 30, §2, invalidated such restraints in deeds and wills becoming effective after the statute. The Married Women (Restraint Upon Anticipation) Act, 1949, 12, 13 & 14 Geo. VI, C. 78, §1 (1), made such invalidation retroactive, so that restraints on alienation and termination in trusts for married women are void, regardless of when the trust instrument became effective.

⁴⁵⁴ 11 Ch. D. 645 (1879). Accord: *Whitby v. Mitchell*, 42 Ch. D. 494 (1889), *aff'd.*, 44 Ch. D. 85 (C.A. 1890).

⁴⁵⁵ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §121c (1915); *TRUSTS RESTATEMENT*, §337 (2) (1935); 2 Simes, *LAW OF FUTURE INTERESTS*, §557 (1936); 3 Scott, *LAW OF TRUSTS* §337 (1939); Part One, note 615 *supra*.

the interest of the *cestui que trust* is inalienable by reason of spendthrift provisions which, as has been seen, are usually valid in the United States,⁴⁵⁶ and where, even though the *cestui's* interest is alienable, one of the purposes of the trust is to postpone the *cestui's* enjoyment of the principal until he reaches a stipulated age. Such provisions for postponement of enjoyment are ordinarily valid in this country under what is known as the rule in *Clafin v. Clafin*.⁴⁵⁷ There is general agreement that provisions which would make trusts for private persons perpetually indestructible are void⁴⁵⁸ and some authority for the view adopted in *In re Ridley*,⁴⁵⁹ that provisions against termination of trusts which might last longer than the period of the Rule Against Perpetuities are void.⁴⁶⁰ The rules on this question are as yet somewhat unsettled.⁴⁶¹

The problem of indestructibility of trusts for private persons is complicated in Michigan by statutory provisions that a conveyance by a trustee of land in contravention of the trust is absolutely void and that the beneficiary of a trust for receipt of the rents and profits of lands cannot assign or dispose of his interest.⁴⁶² In New

⁴⁵⁶ Part One, notes 569-572, *supra*.

⁴⁵⁷ 149 Mass. 19, 20 N.E. 454 (1889).

⁴⁵⁸ TRUSTS RESTATEMENT, §62, *Comment k*. (1935); PROPERTY RESTATEMENT, §381 (1944). The *Restatement* takes no position as to the validity of provisions for indestructibility which are not perpetual but which may last longer than the Rule Against Perpetuities.

⁴⁵⁹ Part Two, note 454 *supra*.

⁴⁶⁰ 2 Simes, LAW OF FUTURE INTERESTS, §§553, 557 (1936); 1 Scott, LAW OF TRUSTS, §62.10 (1939). Cf. Gray, RULE AGAINST PERPETUITIES, 3rd ed., §121i (1915).

⁴⁶¹ Brownell, "Duration of Indestructible and Spendthrift Trusts," 23 CORN. L.Q. 629 (1938); Morray, "The Rule Against Prolonged Indestructibility of Private Trusts," 44 ILL. L. REV. 467 (1949).

⁴⁶² Rev. Stat. 1846, c. 63, §§19, 21, Comp. Laws (1857) §§2649, 2651; Comp. Laws (1871) §§4132, 4134; Comp. Laws (1897) §§8847, 8849; How. Stat., §§5581, 5583; Comp. Laws (1915) §§11583, 11585; Comp. Laws (1929) §§12985, 12987; Mich. Stat. Ann., §§26.69, 26.71; Comp. Laws (1948) §§555.19, 555.20; Part One, notes 580, 583, 602, 621, *supra*.

York these provisions are held to prevent premature termination of trusts even though the beneficiaries are in being, ascertained, of full age and wish to terminate.⁴⁶³ As a trust suspends the absolute power of alienation, a trust of land which might last for more than two lives in being is void if created between 1847 and 1949, when the statutes prohibiting such suspensions were in force.⁴⁶⁴ The repeal of the statutes prohibiting suspension of the absolute power of alienation⁴⁶⁵ leaves us without any statutory restriction on the duration of trusts. If Michigan should follow the New York view, that the statutory inalienability of the interests of the trustee and *cestui que trust* makes trusts for receipt of the rents and profits of land indestructible, it would have either to permit perpetually indestructible trusts or to hold perpetual trusts of land void; it could not then follow the general Anglo-American view, that the trusts themselves are valid but the provisions preventing termination are void, because the provisions preventing termination would be statutory.

In *Bennett v. Chapin*,⁴⁶⁶ land and other property were devised to trustees to pay the income to a daughter of the testatrix until she reached thirty-five and then to transfer the principal to her. Before she reached that age the daughter sued to compel termination of the

⁴⁶³ Part One, note 614 *supra*.

⁴⁶⁴ Part One, note 593 *supra*.

⁴⁶⁵ Part Two, note 61 *supra*.

⁴⁶⁶ 77 Mich. 526, 43 N.W. 893 (1889). The facts are stated more fully in Part One, at note 611 *supra*. See: *Fredericks v. Near*, 260 Mich. 627 at 631, 245 N.W. 537 (1932), Part One, notes 616, 617, *supra*. In *Conover v. Hewitt*, 125 Mich. 34, 83 N.W. 1009 (1900), land was conveyed to a trustee to apply the rents and profits to the use of William Fitzhugh during his life and after his death to apply them to the use of his wife and children during the life of the wife, remainder at her death to the children. After the death of William his widow released her interest to the other beneficiaries. They sued to compel termination of the trust and were granted the relief sought.

trust. It was held that she was entitled to such termination. This decision appears to be a rejection of both the New York view that the statutory inalienability of the interests of the trustee and *cestui que trust* makes trusts for receipt of the rents and profits of land indestructible and of the doctrine of *Claffin v. Claffin*⁴⁶⁷ that the beneficiaries of a trust are not entitled to terminate it if termination would defeat a material purpose of the trust. Subsequent Michigan decisions indicate, however, that a beneficiary of a trust of either land or personalty is not entitled to compel its termination if the trust instrument contains express spendthrift provisions restraining the alienation of the *cestui's* interest.⁴⁶⁸ It would seem that such spendthrift provisions are invalid in Michigan if the beneficiary whose alienation is restrained has more than a life interest in income.⁴⁶⁹ Reading these decisions together, it appears that provisions against termination of a trust are wholly ineffective in Michigan, whether the subject matter is land or chattels, if the beneficiary has an equitable fee simple or equivalent interest. If Andrew Baker devises property to James Thorpe and his heirs upon trust to pay the income to John Stiles and his heirs by a will providing, "it is a material purpose of this trust that no beneficiary thereof shall have access to the principal or be entitled to terminate the trust," the trust is probably valid but the provision against termination void. If, however, a beneficiary has only a life interest, he cannot compel termination in contravention of express provisions of the trust

⁴⁶⁷ Part Two, notes 455, 457, *supra*.

⁴⁶⁸ *Rose v. Southern Michigan National Bank*, 255 Mich. 275, 238 N.W. 284 (1931); *Hay v. Le Bus*, 317 Mich. 698, 27 N.W. (2d) 309 (1947), Part One, note 647 *supra*.

⁴⁶⁹ *In re Ford's Estate*, 331 Mich. 220, 49 N.W. (2d) 154 (1951), Part One, note 650 *supra*.

instrument, even with the cooperation of the beneficiaries in remainder. If Andrew Baker devises property to James Thorpe and his heirs upon trust to pay the income to John Stiles for life and then to transfer the principal to Roger White, his heirs, and assigns by a will providing "John Stiles shall not alienate or anticipate his right to income under this trust," John and Roger probably cannot compel the trustee to transfer the property to them during John's lifetime.

This raises the problem in *In re Ridley*.⁴⁷⁰ If Andrew Baker devises property to James Thorpe and his heirs upon trust to pay the income to John Stiles, who has no son, for life, then to pay the income to the eldest son of John for life, then to transfer the principal to Roger White, his heirs and assigns, by a will providing, "no life beneficiary under this trust shall alienate or anticipate his interest," is the restraint on termination valid? If so, it may make the trust indestructible for longer than lives in being and twenty-one years. *In re Ridley* and the best American authorities would hold the restraint invalid.⁴⁷¹ Michigan should do so.

⁴⁷⁰ Part Two, note 454 *supra*.

⁴⁷¹ Part Two, note 459 *supra*. But see: *Blossom v. Anketell*, 275 Fed. 947 (E.D. Mich. 1921).

CHAPTER 16

Accumulations

A. THE COMMON-LAW RULE AGAINST ACCUMULATIONS

A DIRECTION to accumulate is a provision in an instrument limiting interests in property, usually by way of trust, that income shall be added to principal so as to increase the corpus.⁴⁷² If Andrew Baker bequeaths property to James Thorpe upon trust to add the income received during the life of John Stiles to the principal and, upon the death of John, to pay the accumulated fund to the children of John who survive him, an accumulation is directed. A direction to use income to preserve, as distinguished from increase, the principal is not a provision for an accumulation. Thus a provision in a trust instrument that income shall be used to pay taxes, rent, or repair costs, or to replace such a wasting asset as a valuable lease or a mine, is not a direction to accumulate.⁴⁷³ But a provision for use of income in a manner which will increase the original principal, as by payment of an existing mortgage on the trust property, paying premiums on an insurance policy on the life of the settlor which is an asset of the trust, or treating stock dividends as principal, is a direction to accumulate,⁴⁷⁴ as is a provision that part of the income

⁴⁷² PROPERTY RESTATEMENT, §439 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY §25.109 (1952).

⁴⁷³ PROPERTY RESTATEMENT, §439, *Comments a., d., j.*, (1944).

⁴⁷⁴ Simes, "Statutory Restrictions on the Accumulation of Income," 7 UNIV. OF CHICAGO L. REV. 409 at 417 (1940); PROPERTY RESTATEMENT, §439, *Comments f., g., h.* (1944).

shall be paid to the beneficiaries and part added to the principal.

If the completion of an accumulation is a condition precedent to the interests of its beneficiaries and it may not be accomplished within the period of the Rule Against Perpetuities, those interests are void by virtue of the normal operation of the Rule as a rule against remoteness of vesting.⁴⁷⁵ If Andrew Baker bequeaths \$100,000 to James Thorpe upon trust to add income to principal until the fund reaches \$1,000,000 and to pay the accumulated fund to the issue of John Stiles then in being, the limitation to the issue of John is void because they may not be ascertainable within lives in being and twenty-one years. The same would be true if Andrew Baker bequeaths property to James Thorpe upon trust to add income to principal for fifty years and to pay the accumulated fund to the issue of John Stiles then in being.

In England at common law, if the interests of the beneficiaries were certain to vest within the period of the Rule Against Perpetuities and the accumulation was certain to cease at or before the time that such interests vested, a provision for accumulation was valid.⁴⁷⁶ If John Stiles bequeaths property to James Thorpe upon trust to add income to principal "during the lives of all my issue living at the time of my death and for twenty-one years thereafter and to pay the accumulated fund to my issue then living," the provision for accumulation is valid at common law. Because the English law of

⁴⁷⁵ Lord Southampton v. Marquis of Hertford, 2 V.&B. 54, 35 Eng. Rep. 239 (1813); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §§671, 677 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §587 (1936); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §§24.42, 24.65 (1952).

⁴⁷⁶ Thellusson v. Woodford, 11 Ves. Jr. 112, 32 Eng. Rep. 1030 (1805); 1 Scott, LAW OF TRUSTS, §62.11.

accumulations became statutory in 1800, there are few precedents as to the common-law rules, but it would seem that, so long as the interests of the beneficiaries were certain to vest within the period of the Rule Against Perpetuities, the fact that a provision for accumulation might operate for longer than that period did not invalidate it.⁴⁷⁷ If Andrew Baker bequeathed property to James Thorpe upon trust "for the children of John Stiles, income to be added to principal for thirty years and the accumulated fund then to be paid to such children, their executors, administrators and assigns," it would seem that the provision for accumulation was valid. Such a provision did not tie up property for longer than the period of the Rule because, under English law, the beneficiaries could compel termination of the trust as soon as they were ascertained and of age, even though the accumulation was incomplete.⁴⁷⁸

As has been seen, in this country the beneficiaries of a trust cannot always compel its termination even though they are all in being, ascertained, and of full age.⁴⁷⁹ Consequently, a provision for accumulation ties up property here although the interests of the beneficiaries are vested. That being so, the American courts have developed a rule corollary to the Rule Against Perpetuities known as the Common-Law Rule Against Accumulations. Under this rule, whether or not the interests of the beneficiaries are vested, a provision for accumulation is wholly void if the accumulation may possibly continue for longer than the period of the Rule Against Perpe-

⁴⁷⁷ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §672 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §588 (1936). See: *Tregonwell v. Sydenham*, 3 Dow 194, 3 Eng. Rep. 1035 (H.L. 1815); *Wharton v. Masterman*, [1895] A.C. 186.

⁴⁷⁸ *Saunders v. Vautier*, Cr. & Ph. 240, 41 Eng. Rep. 482 (1841); Part Two, note 452 *supra*.

⁴⁷⁹ Part Two, notes 455, 456, 457, *supra*.

tuities.⁴⁸⁰ The Common-Law Rule Against Accumulations has a partial exception in the case of charities. If the interest of a charitable beneficiary is vested, a provision for an accumulation in its favor which may continue longer than the period of the Rule Against Perpetuities is not void, but a court of competent jurisdiction may shorten the period of accumulation.⁴⁸¹

B. THE MICHIGAN STATUTES

Chapter 62 of the Michigan Revised Statutes of 1846 provided:

"Sec. 37. An accumulation of rents and profits of real estate, for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real estate, as follows:

"1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority:

"2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall com-

⁴⁸⁰ 2 Simes, LAW OF FUTURE INTERESTS, §589 (1936); PROPERTY RESTATEMENT, §441, (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.65 (1952). Professor Simes thinks that this is the same rule as that which restricts provisions making trusts indestructible. "Statutory Restrictions on the Accumulation of Income," 7 UNIV. OF CHICAGO L. REV. 409 at 410 (1940).

⁴⁸¹ St. Paul's Church v. Attorney-General, 164 Mass. 188, 41 N.E. 231 (1895); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §678 (1915); 3 Scott, LAW OF TRUSTS, §401.9 (1939); PROPERTY RESTATEMENT, §442 (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.42 (1952). This seems to have been the rule in England at one time. Harbin v. Masterman, L.R. 12 Eq. 559 (1871). Now, however, where a vested interest is given to a charity, subject to a provision for accumulation, the provision for accumulation is void and the charity takes the principal at once. Wharton v. Masterman, [1895] A.C. 186.

mence within the time in this chapter permitted for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority.

“Sec. 38. If in either of the cases mentioned in the last preceding section, the direction for such accumulation shall be for a longer time than during the minority of the persons intended to be benefited thereby, it shall be void as to the time beyond such minority; and all directions for the accumulation of the rents and profits of real estate, except such as are herein allowed, shall be void.

“Sec. 39. When such rents and profits are directed to be accumulated for the benefit of infants entitled to the expectant estate, and such infants shall be destitute of other sufficient means of support and education, the chancellor, upon the application of their guardian, may direct a suitable sum out of such rents and profits to be applied to their maintenance and education.

“Sec. 40. When in consequence of a valid limitation of an expectant estate, there shall be a suspense of the power of alienation, or of the ownership, during the continuance of which the rents and profits shall be undisposed of and no valid direction for their accumulation is given, such rents and profits shall belong to the person presumptively entitled to the next eventual estate.”⁴⁸²

Chapter 63 of the Michigan Revised Statutes of 1846 provides:

⁴⁸² Rev. Stat. 1846, c. 62, §§37 to 40; Comp. Laws (1857) §§2621 to 2624; Comp. Laws (1871) §§4104 to 4107; Comp. Laws (1897) §§8819-8822; How. Stat., §§5553 to 5556; Comp. Laws (1915) §§11555 to 11558; Comp. Laws (1929) §§12957 to 12960; Mich. Stat. Ann., §§26.37 to 26.40; Comp. Laws (1948) §§554.37 to 554.40. These provisions were taken from N.Y. Rev. Stat. 1829, part II, c. 1, tit II, art. First, §§37-40. Sections 37 and 38 were amended in important respects by Act 227, P.A. 1949, and all four sections were repealed by Acts 6, 7 P.A. 1952. See Part Two, note 501 *infra*.

"Sec. 11. Express trusts may be created for any or either of the following purposes: - - -

"4. To receive the rents and profits of lands, and to accumulate the same for the benefit of any married woman, or for either of the purposes and within the limits prescribed in the preceding chapter." ⁴⁸³

In *St. Amour v. Rivard*,⁴⁸⁴ a case involving the will of a testator who died in 1841, the Court stated that, at common law, a provision for accumulation for longer than the period of the common-law Rule Against Perpetuities would be wholly void.

Toms v. Williams ⁴⁸⁵ involved the will of a testatrix who died in 1876 owning land which was subject to a forty-year lease, given in 1854, which required the lessor to pay for buildings erected by the lessee at the expiration of the term in 1894 or to grant a renewal lease for an additional forty years. The will devised this and other land and also personal property to trustees (1) to set aside annually until 1894 \$5,000 of the income as a sinking fund to pay for the buildings, (2) to accumulate the rest of the income until the expiration of the minority of the youngest of John R., Gershom M. and Mary J. Williams, (3) to pay over such accumulation and subsequently accruing income to these three persons after the youngest was of age, (4) to pay for the buildings in 1894, and then to transfer the entire corpus of the trust to the three persons. John R. Williams came

⁴⁸³ Rev. Stat. 1846, c. 63, §11, Comp. Laws (1857) §2641; Comp. Laws (1871) §4124; Comp. Laws (1897) §8839; How. Stat., §5573; Comp. Laws (1915) §11575; Comp. Laws (1929) §12977; Mich. Stat. Ann., §26.61; Comp. Laws (1948) §555.11. This subsection was taken from N.Y. Rev. Stat. 1829, part II, c. 1, tit. II, art. Second, §55, but the words "for the benefit of any married woman" were not in the New York section.

⁴⁸⁴ 2 Mich. 294 at 299-300 (1852), Part Two, note 39 *supra*. The case did not involve an accumulation, so the language is dictum.

⁴⁸⁵ 41 Mich. 552, 2 N.W. 814 (1879).

of age before the death of the testatrix, Gershom M. Williams did so in 1878, and Mary J. Williams would do so in 1881. The Court held that the interests of John R., Gershom M., and Mary J. Williams vested immediately upon the death of the testatrix and that both provisions for accumulation were valid. The opinion states that the Michigan accumulation statutes had no application to accumulations of income of personal property, and that directions for such accumulations limited to lives in being and twenty-one years are valid.⁴⁸⁶ Rejecting New York decisions to the contrary, the Court held that our statutes permitted an accumulation of the rents and profits of land for the benefit of any number of minors until the youngest came of age.⁴⁸⁷ Likewise, rejecting New York decisions to the contrary, the Court held that our statutes did not invalidate provisions for accumulations to pay off what amounted to an encumbrance on the trust property.⁴⁸⁸

In *Wilson v. Odell*,⁴⁸⁹ a will devised land and personalty to trustees (1) to pay an annuity of \$1500 to the testator's wife for her life, (2) to pay annuities of \$600 for or to each of his children while under fourteen and \$1,000 thereafter for life, (3) to continue the children's annuities to their children until the youngest was of age, (4) to transfer the corpus to the children's children after all the children were dead and the youngest of their children was of age. The Court held that the limitation of the principal violated the statutes prohibiting suspension of the absolute power of alienation and

⁴⁸⁶ 41 Mich. 552 at 562. Accord: *Post v. Grand Rapids Trust Co.*, 255 Mich. 436, 238 N.W. 206 (1931), Part Two, note 495 *infra*.

⁴⁸⁷ 41 Mich. 552 at 568-569. See: Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §§25.110, 25.114 (1952).

⁴⁸⁸ 41 Mich. 552 at 575. See: Whiteside, *id.*, §§25.109, 25.114 (1952).

⁴⁸⁹ 58 Mich. 533, 25 N.W. 506 (1885).

that, as the annuities given to the testator's children would not consume the entire income, the direction as to them was for an accumulation which, under our accumulation statutes, could not last beyond the time when the youngest of the testator's children came of age. This decision illustrates the fact that, whereas an accumulation which violates the Common-Law Rule Against Accumulations is wholly void, an accumulation for a minor which violates the statutes because it is to extend beyond minority is void only as to the excess.

*Palms v. Palms*⁴⁹⁰ involved a will which devised land and other property to trustees to pay the income to the testator's two children for life and then to transfer the principal to their children as each came of age. A codicil directed the trustees to treat royalties under mineral leases as principal during the minority of testator's grandchildren "now living." The Court observed that if this codicil directed an accumulation of the rents and profits of land, it would be void under the statutes because it was to commence at once but might be for the benefit of persons not yet in being. It held, however, that the mineral royalties were not rents and profits but the proceeds of sales of iron ore.

In *Eldred v. Shaw*,⁴⁹¹ land and sheep were devised to a trustee for a grandson with directions to apply only so much of the income as was necessary to the support, education, and maintenance of the beneficiary during minority, "and, in the case of the death of my said grandson without heirs by his body begotten, the lands

⁴⁹⁰ 68 Mich. 355, 36 N.W. 419 (1888). Cf. *Poole v. Union Trust Co.*, 191 Mich. 162, 157 N.W. 430 (1916), where the Court, without overruling *Palms v. Palms* on the accumulation question, allowed the life income beneficiary under a trust the entire royalties paid during her lifetime under mineral leases given by the settlor.

⁴⁹¹ 112 Mich. 237, 70 N.W. 545 (1897), Part One, note 98 *supra*.

with all its increases and accretions I give, devise and bequeath" to adult children of the testator. It was held that the grandson took an estate tail, subject to trust during minority, which, by operation of the fee tail statute,⁴⁹² became a fee simple subject to a contingent limitation (shifting executory interest) on death without issue. The Court decided that the provision for accumulation of surplus income was valid under the accumulation statutes and that the accumulated fund should be held on trust for the life of the grandson, he to receive the income and the principal to go with the land. In reaching the latter conclusion, the Court seems to have overlooked the fact that the statutes permitted accumulations of the rents and profits of the land only for the benefit of minors. An accumulation during the minority of a child for the benefit of an adult is not permitted by the statutes. The New York decisions make it clear that accumulations are invalid unless for the exclusive benefit of the persons during whose minority they are made, that the minor is entitled to the whole accumulation on coming of age, and that a limitation giving it to another on a contingency is void.⁴⁹³

In *Hull v. Osborn*,⁴⁹⁴ the residue of an estate was devised to testator's two granddaughters, \$10,000 to be paid to each on reaching twenty-five, \$10,000 on reaching thirty, \$10,000 on reaching thirty-five, \$10,000 on reaching forty, and the balance of half the residue on reach-

⁴⁹² Part One, note 84 *supra*.

⁴⁹³ Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.110 (1952); PROPERTY RESTATEMENT, §445 (1944). The *Restatement* and a 1945 amendment to the New York statute [Laws 1945, c. 558, Real Prop. Law, §61a] provide that a gift to others of the accumulated fund on death of the minor before reaching twenty-one is valid.

⁴⁹⁴ 151 Mich. 8, 113 N.W. 784 (1908). Cf. *Hunter v. Hunter*, 160 Mich. 218, 125 N.W. 71 (1910).

ing forty-five. The will provided that if either died before reaching forty-five, without issue, the unpaid portion of her share should pass to the other and that if both so died, all unpaid should pass to persons to be ascertained at that time. It was held that the entire interests of the granddaughters vested on the death of the testator, subject to being divested by death without issue before reaching forty-five, and that the provisions for postponement of payment did not violate "the rule as to perpetuities or accumulations." The Court thought that these provisions postponed only payment of principal and that the granddaughters were entitled to the entire income as it accrued.

In *Post v. Grand Rapids Trust Co.*,⁴⁹⁵ half the residue of an estate, consisting wholly of personalty, was bequeathed to trustees to pay from the income not to exceed \$300 per month to testatrix's daughter Fannie for life and then to her issue until her youngest child living at the testatrix's death reached twenty-five, then to transfer the principal and accumulated surplus income to the issue of Fannie. When one of her two children was a minor and the other was of age, Fannie and her children petitioned for payment of more than \$300 a month (the total income being some \$450 per month) to pay for the education of the children. A decree ordering such payment was reversed insofar as it related to the child who was of age. The Court ruled that, as the accumulation statutes related only to the rents and

⁴⁹⁵ 255 Mich. 436, 238 N.W. 206 (1931). In *Hay v. Hay*, 317 Mich. 370, 26 N.W. (2d) 908 (1947), personalty was bequeathed to a trustee to pay certain life annuities and accumulate the surplus income until twenty-one years after the death of the last survivor of the grandchildren of the testator who were living when he died, then to pay the accumulated fund to his heirs, to be determined at that time. There were seven grandchildren living when the testator died. The provisions were treated as valid.

profits of land they had no application and, hence, that the direction to accumulate for a period measured by lives in being was valid. It held, nevertheless, that a court may direct advancements from an accumulation for the education and support of minor beneficiaries.⁴⁹⁶

The testator in *Loomis v. Laramie*⁴⁹⁷ devised the residue of his estate, consisting of land and personalty, to trustees to accumulate the income for twenty years and then to transfer the principal and accumulated income to five named persons "and the heirs of their body forever." The Court, without mentioning the accumulation statutes, held that the trust was void because it suspended the absolute power of alienation for a period not based on lives in violation of the statutes then in force and that the five persons were entitled to the residue immediately and absolutely. The same result should have been reached if the accumulation statutes had been considered and applied.

*In re Dingler's Estate*⁴⁹⁸ involved a devise of an estate to trustees to pay the income to testatrix's twin granddaughters in quarterly instalments until they reached thirty and then to transfer the principal to them "or to the survivor unless one of said granddaughters shall die leaving issue surviving." It was held that the provision for payment of the income in quarterly instalments was not a direction to accumulate because it did not involve adding income to principal.

⁴⁹⁶ Citing *Knorr v. Millard*, 52 Mich. 542, 18 N.W. 349 (1884), which reached the same result on the ground that, as Rev. Stat. 1846, c. 62, §39 [Part Two, note 482 *supra*] expressly authorizes such advancements from accumulations of the rents and profits of land, a court of equity should have power to direct them from accumulations of the income from personalty. Accord: *Knorr v. Millard*, 57 Mich. 265, 23 N.W. 807 (1885).

⁴⁹⁷ 286 Mich. 707, 282 N.W. 876 (1938).

⁴⁹⁸ 319 Mich. 189, 29 N.W. (2d) 108 (1947).

*In re Mac Donell's Estate*⁴⁹⁹ concerned a devise of land and a small amount of personalty to trustees to pay the testator's son Donald \$200 a month until he reached thirty-five and then to transfer the corpus of the trust to him. Before reaching thirty-five, Donald sued to compel the trustees to pay him the entire income. The trustees contended that the accumulation statutes were inapplicable because the will did not expressly direct accumulation and because it conferred upon the trustees discretionary power to pay Donald more than \$200 a month in the event of emergency. A decree for the trustees was reversed, the Court holding that the accumulation statutes applied to a mixed disposition of land and personalty and that an implied direction to accumulate was governed by them. As there was no other beneficiary, it would seem that Donald would have been entitled to compel termination of this trust under the rule in *Bennett v. Chapin*.⁵⁰⁰ He did not seek to do so.

Sections 37 and 38 of Chapter 62 of the Revised Statutes of 1846 were amended by Act 227, Public Acts of 1949, to read as follows:

"Sec. 37. An accumulation of rents and profits of real estate, *or of the profits or income of personal estate, or both*, for the benefit of 1 or more persons, may be directed by any will or deed sufficient to pass real *or personal* estate, as follows:

"First. If such accumulation be directed to commence

⁴⁹⁹ 325 Mich. 449, 39 N.W. (2d) 32 (1949). But see *In re Peck's Estate*, 323 Mich. 11 at 20-21, 34 N.W. (2d) 533 (1948). An accumulation of the income from a mixed mass of property consisting of land worth \$40,000 and personalty worth \$40,000,000, to last until certain children reached twenty-five, was involved in *Dodge v. Detroit Trust Co.*, 300 Mich. 575, 2 N.W. (2d) 509 (1942). Its validity was not determined.

⁵⁰⁰ 77 Mich. 526, 43 N.W. 893 (1889), Part One, note 611, Part Two, note 466, *supra*. See: PROPERTY RESTATEMENT, §441, *Comment c.* (1944).

on the creation of the estate out of which the rents and profits or income are to arise, it must be made for the benefit of 1 or more minors then in being, and terminate at the expiration of their minority.

"Second. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits *or income of real estate or the income of personal estate, or both*, are to arise, it shall commence within the time in this chapter permitted for the vesting of future estates, and during the minority of the persons *in being at the creation thereof*, for whose benefit it is directed, and shall terminate at the expiration of such minority.

"Sec. 38. If in either of the cases mentioned in the last preceding section, the direction, in *any will or deed heretofore or hereafter attested, executed or delivered*, for such accumulation shall be for a longer time than during the minority of the persons intended to be benefited thereby, *or for a longer time than 33 years from the death of the maker of any will*, it shall be void as to the time beyond said minority *or said 33 years*; and all directions for the accumulation of the rents and profits of real estate, *or of the profits or income of personal estate*, except such as are herein allowed, shall be void." ⁵⁰¹

These amendments extended the restrictions imposed by the sections, which had theretofore applied only to accumulations of income from land and mixed property, to accumulations of income of personalty. Moreover, they increased the stringency of the restrictions by requiring that accumulations be for the benefit of minors in being *at the creation of the estate*, which means at the effective date of the deed or will directing the ac-

⁵⁰¹ Act 227, P.A. 1949, §1, Mich. Stat. Ann., §§26.37, 26.38; Comp. Laws (1948) §§554.37, 554.38. Language added by amendment shown by italics.

cumulation.⁵⁰² If Andrew Baker devised land to James Thorpe upon trust to pay the income to John Stiles for life, then to accumulate the rents and profits during the minority of John's eldest son, and to transfer the land and accumulation to such son at his majority, the direction to accumulate would have been valid under the statutes in their original form whether or not John's eldest son was in being when the testator died.⁵⁰³ The amendments to Section 37 would make it invalid unless the eldest son was in being when the testator died. This being so, the thirty-three year provision in the amendment to Section 38 could have no application. Section 37, as amended, restricted accumulations directed by will to the minority of a person in being when the testator died. Such a minority could not last for more than twenty-one years and nine months after the testator's death.⁵⁰⁴

Sections 37, 38, 39, and 40 of Chapter 62, Revised

⁵⁰² Rev. Stat. 1846, c. 62, §41, Comp. Laws (1857) §2625; Comp. Laws (1871) §4108; Comp. Laws (1897) §8823; How. Stat., §5557; Comp. Laws (1915) §11559; Comp. Laws (1929) §12961; Mich. Stat. Ann., §26.41; Comp. Laws (1948) §554.41, provides: "The delivery of the grant, where an expectant estate is created by grant; and where it is created by devise, the death of the testator shall be deemed the time of the creation of the estate." Mr. Thomas G. Long of the Detroit Bar thinks that what must have been meant was in being "at the commencement of the accumulation" rather than "at the creation of the estate" in the technical statutory sense of that term. "Perpetuities and Accumulations: Recent Legislative Acts Explained," 17 DETROIT LAWYER 193 (1949). Mr. Long's suggestion tends to explain the otherwise meaningless 33-year provision in Section 38.

⁵⁰³ *Manice v. Manice*, 43 N.Y. 303 (1871), Part Three, note 367 *infra*. See *Van Gallow v. Brandt*, 168 Mich. 642, 134 N.W. 1018 (1912), Part Three, note 366 *infra*.

⁵⁰⁴ Professor Whiteside thought that this provision was intended to validate a direction in a will to accumulate for a period in gross of thirty-three years, unconnected with minorities. "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.112. If so, it certainly was not well drafted to accomplish this purpose. See note 502 *supra*.

Statutes of 1846, as amended,⁵⁰⁵ were repealed, as to wills of persons dying after the effective date of the repealing acts and deeds delivered thereafter, by Acts 6 and 7, Public Acts of 1952, which became effective on September 18, 1952. As a result of these repeals, there are now no restrictions on accumulations in Michigan except the Common-Law Rule Against Accumulations.⁵⁰⁶ It should be noted, however, that the repealing acts apply only to accumulations directed by wills or deeds becoming effective after September 18, 1952. The 1949 amendments, which extended the prior statutory restrictions on accumulations to personal property and increased their stringency, are still in force as to accumulations directed by wills or deeds which became effective before that date. Moreover, the 1949 amendments expressly purported to govern accumulations directed by deeds or wills which became effective at any time *before* the amendments were enacted. If this provision for retroactive application is constitutionally valid, the 1949 amendments make void many directions for accumulation which were valid when the deed or will containing them became effective, such as that involved in *Post v. Grand Rapids Trust Co.*⁵⁰⁷

⁵⁰⁵ Part Two, notes 482, 501, *supra*.

⁵⁰⁶ Part Two, note 480 *supra*. The existence of this rule was recognized in *St. Amour v. Rivard*, 2 Mich. 294 at 299-300 (1852), Part Two, notes 39, 484, *supra*; *Toms v. Williams*, 41 Mich. 552, 2 N.W. 814 (1879), Part Two, note 485 *supra*.

⁵⁰⁷ Part Two, note 495 *supra*. Mr. Thomas G. Long of the Detroit Bar thinks that, if the 1949 amendments were really intended to be retroactive, they were unconstitutional to that extent because they would disturb vested interests. "Perpetuities and Accumulations: Recent Legislative Acts Explained," 17 DETROIT LAWYER 193 (1949). It is to be hoped that Mr. Long is correct, but the question is far from being free of doubt. If Andrew Baker died in 1948 bequeathing \$100,000 to James Thorpe upon trust to pay \$100 a month to Lucy Baker for life and to accumulate the surplus income until her death, then to pay over the accumulated fund to John Stiles, his executors,

Trusts created by employers as part of a stock bonus plan, pension plan, disability or death benefit plan, or profit-sharing plan, for the benefit of employees⁵⁰⁸ and trusts or funds established by cemetery corporations for perpetual care of graves⁵⁰⁹ are expressly excepted by statute from legal restrictions on the duration of accumulations. It will be recalled that charitable trusts are excepted by statute from the Rule Against Perpetuities.⁵¹⁰ As the statute does not expressly except them from the Common-Law Rule Against Accumulations, it would seem that that rule should be applied to charities here as it is applied in other jurisdictions. That is, a provision for accumulation in a limitation in favor of charity which may operate for longer than the period of the Rule Against Perpetuities is valid, but a court of competent jurisdiction may shorten the period of accumulation.⁵¹¹

administrators or assigns, the amendments would not divest any interest; they would merely entitle John Stiles to demand the surplus income during the life of Lucy Baker.

⁵⁰⁸ Act 193, P.A. 1947, §2 amended, Act. 61, P.A. 1951, Mich. Stat. Ann., §26.82 (2); Comp. Laws (1948) §555.302.

⁵⁰⁹ Act 308, P.A. 1917, Comp. Laws (1929) §10435; Mich. Stat. Ann., §21.855; Comp. Laws (1948) §456.35.

⁵¹⁰ Part Two, note 421 *supra*.

⁵¹¹ Part Two, note 481 *supra*.

Consequences of Violation of the Rule

A. EXCISION OF THE LIMITATION WHICH VIOLATES THE RULE

WHEN an interest in property is limited subject to an illegal provision for defeasance by way of condition subsequent or executory limitation, the provision for defeasance is void but the interest itself is usually valid and indefeasible.⁵¹² If Andrew Baker conveys land to John Stiles and his heirs, "but if the grantee or his heirs shall attempt to alienate, the grantor or his heirs may re-enter and terminate the estate hereby conveyed," the condition subsequent is void as an illegal direct restraint on alienation of an estate in fee simple, and John takes an indefeasible fee.⁵¹³ When, on the other hand, an interest in property is limited subject to a condition precedent which is illegal because it may be fulfilled at a time beyond the period of the common-law Rule Against Perpetuities, the interest itself as well as the condition is void.⁵¹⁴ In some cases it would be possible for the courts to treat the condition as void but the interest as valid. Thus if Andrew Baker conveys land to John Stiles, who has no children, for life, remainder to the children of John who reach

⁵¹² PROPERTY RESTATEMENT, §228, *Comment d.*, §229 (1936); Browder, "Illegal Conditions and Limitations," 6 AMERICAN LAW OF PROPERTY, §27.22 (1952).

⁵¹³ Part One, note 108 *supra*; Mandlebaum v. McDonell, 29 Mich. 78 (1874), Part One, note 138 *supra*; Braun v. Klug, 335 Mich. 691, 57 N.W. (2d) 299 (1953), Part One, note 162 *supra*; PROPERTY RESTATEMENT, §406, *Ill.* 1 (1944).

⁵¹⁴ Gray, RULE AGAINST PERPETUITIES, 3rd ed., §201 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §520 (1936); PROPERTY RESTATEMENT, §§370, 371 (1944).

twenty-five, it would be possible to delete the words "who reach twenty-five" and give the children an interest which would vest on the death of John. Although conditions precedent which are illegal for some other reason than the Rule Against Perpetuities are sometimes handled in this manner,⁵¹⁵ conditions which violate the Rule are not. If a condition precedent is void under the Rule, the interest subject to it is also void.

English law recognized an exception to the rule of complete nullity of interests limited in violation of the Rule Against Perpetuities in two related situations. When land was devised to an unborn person for life with remainder in tail to his children or to an unborn person for life with successive remainders for life to each generation of his descendants forever, the first unborn person took an estate tail under what was known as the *cy pres* doctrine.⁵¹⁶ *St. Amour v. Rivard*⁵¹⁷ involved a will devising land to a son for life, remainder to his children for life, with successive remainders for life to each generation of his descendants. There were similar devises to others, with cross-remainders on extinction of issue of any initial devisee. The Court discussed the *cy pres* doctrine at some length and refused to apply it. Of course the *cy pres* doctrine cannot be applied in its

⁵¹⁵ PROPERTY RESTATEMENT, §424, *Comment d.* (1944); Browder, "Illegal Conditions and Limitations," 6 AMERICAN LAW OF PROPERTY, §27.22 (1952).

⁵¹⁶ *Nicholl v. Nicholl*, 2 Black. W. 1159, 96 Eng. Rep. 683 (1777); *Humberston v. Humberston*, 1 P. Wms. 332, 24 Eng. Rep. 412 (1716); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §§643, 652 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §552 (1936). This is not the same as the doctrine of the same name which is applied when the specific purpose of a charitable trust fails or does not require the whole trust property.

⁵¹⁷ 2 Mich. 294 (1852). The testator died in 1841, so the common-law Rule Against Perpetuities applied to the devises of land.

original form to wills of testators who died after March 2, 1821, when estates tail were abolished.⁵¹⁸

Generally speaking, when a limitation is void under the Rule Against Perpetuities, it is stricken out of the instrument and, unless they are inseparably connected with it, the other limitations of the instrument take effect as if it had not contained the void limitation.⁵¹⁹ If the void limitation is the only one made by the instrument or is a limitation of an ultimate remainder, the interest invalidly limited never passes out of the transferor by virtue of the limitation. In such a case, if the void limitation is contained in a deed, the interest ineffectively limited simply remains in the grantor.⁵²⁰ If it is contained in the residuary clause of a will, the interest passes to the heirs or next of kin of the testator as intestate property.⁵²¹ If it is contained in a prior clause

⁵¹⁸ Part One, note 82 *supra*.

⁵¹⁹ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §247 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §529 (1936); *PROPERTY RESTATEMENT*, §402 (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.47 (1952).

⁵²⁰ *Methodist Episcopal Church of Newark v. Clark*, 41 Mich. 730, 3 N.W. 207 (1879) (deed of land violating suspension statutes); *Hopkins v. Crossley*, 138 Mich. 561, 101 N.W. 822 (1904); (inter vivos trust of personalty); *Casgrain v. Hammond*, 134 Mich. 419, 96 N.W. 510 (1903) (deed of land violating suspension statutes); *McPherson v. Byrne*, 155 Mich. 338, 118 N.W. 985 (1909) (inter vivos trust of personalty); *PROPERTY RESTATEMENT*, §403 (1944). Cf. *Bateson v. Bateson*, 294 Mich. 426, 293 N.W. 705 (1940).

⁵²¹ *Wilson v. Odell*, 58 Mich. 533, 25 N.W. 506 (1885) (ultimate remainder in land violating suspension statutes); *Farrand v. Petit*, 84 Mich. 671, 48 N.W. 156 (1891) (ultimate remainder in land violating suspension statutes); *Trufant v. Nunneley*, 106 Mich. 554, 64 N.W. 469 (1895) (ultimate remainder in land violating suspension statutes); *Wheelock v. American Tract Society*, 109 Mich. 141, 66 N.W. 955 (1896) (residue consisting of land and personalty); *Petit v. Flint & Pere Marquette R.R. Co.*, 114 Mich. 362, 72 N.W. 238 (1897) (ultimate remainder in land violating suspension statutes); *State v. Holmes*, 115 Mich. 456, 73 N.W. 548 (1898) (ultimate remainder in land and personalty violating suspension statutes); *Niles v. Mason*, 126 Mich. 482, 85 N.W. 1100 (1901) (residue consisting of land and personalty; disposition violating the suspension statutes); *Gilchrist v. Corliss*, 155

of a will, the interest falls into the residue and passes under the residuary clause.⁵²² If Andrew Baker conveys land to John Stiles "if and when the Penobscot Building falls," the deed conveys nothing, and Andrew retains a fee simple absolute. If Andrew Baker devises the residue of his estate to John Stiles, who has no children, for life, remainder to those children of John who reach twenty-five, John takes a life estate and the heirs of Andrew inherit the reversion. If Andrew Baker devises land to John Stiles, who has no children, for life, remainder to those children of John who reach twenty-five, and devises the residue of his estate to James Thorpe and his heirs, John takes a life estate and James the remainder in fee.

Mich. 126, 118 N.W. 938 (1908) (ultimate remainder in land and personalty); *Moore v. O'Leary*, 180 Mich. 261, 146 N.W. 661 (1914) (residue consisting of land and personalty); *Otis v. Arntz*, 198 Mich. 196, 164 N.W. 498 (1917) (disposition of residue, consisting of land and personalty, violating the suspension statutes); *Rozell v. Rozell*, 217 Mich. 324, 186 N.W. 489 (1922) (ultimate remainder in land violating the suspension statutes); *Grand Rapids Trust Co. v. Herbst*, 220 Mich. 321, 190 N.W. 250 (1922) (disposition of entire estate violating suspension statutes); *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924) (ultimate remainder violating common-law Rule Against Perpetuities); *Burke v. Central Trust Co.*, 258 Mich. 588, 242 N.W. 760 (1932) (disposition of entire estate violating suspension statute); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934) (disposition of residue, consisting of land and personalty, violating both the suspension statutes and the common-law Rule); *In re Richards' Estate*, 283 Mich. 485, 278 N.W. 657 (1938) (disposition of residue, consisting of land and personalty, violating the suspension statutes); PROPERTY RESTATEMENT, §403, *Comments h., i.* (1944). See: *James E. Scripps Corporation v. Parkinson*, 186 Mich. 663, 153 N.W. 29 (1915) (ultimate remainder violating suspension statutes).

⁵²² *Van Driele v. Kotvis*, 135 Mich. 181, 97 N.W. 700 (1903) (annuity violating suspension statutes); *Stoepel v. Satterthwaite*, 162 Mich. 457, 127 N.W. 673 (1910) (bequest of personalty on void trust); *Lounsbury v. Trustees of Square Lake Burial Association*, 170 Mich. 645, 129 N.W. 36 (1912) (bequest of personalty on perpetual honorary trust); PROPERTY RESTATEMENT, §403, *Comment c.* (1944). See: *Snyder v. Potter*, 328 Mich. 236, 43 N.W. (2d) 922 (1950) (ultimate remainder, not in residuary clause, violating the suspension statutes).

Where an interest which violates the Rule Against Perpetuities is limited to follow a prior interest, its invalidity does not enlarge the prior interest. If Andrew Baker conveys land to John Stiles and his heirs so long as the Penobscot Building stands and then to James Thorpe and his heirs, the shifting executory limitation to James is void, but its invalidity does not make John's estate endure after the Penobscot Building falls. Andrew Baker retains a possibility of reverter which will become possessory in that event.⁵²³ On the other hand, if the void interest is limited to cut off a prior interest, the prior interest is indefeasible. If Andrew Baker conveys land to John Stiles and his heirs, "but if the Penobscot Building should fall, then to James Thorpe and his heirs," the interest of James is void, and John takes an indefeasible estate in fee simple absolute.⁵²⁴

If an appointment under a power of appointment which is limited as to objects violates the Rule, the property passes to the persons to whom it is limited in default of appointment.⁵²⁵ If an appointment under a power of appointment which is not limited as to objects violates the Rule, the effect is the same under some cir-

⁵²³ *Leonard v. Burr*, 18 N.Y. 96 (1858); *First Universalist Society v. Boland*, 155 Mass. 171, 29 N.E. 524 (1892); 2 Simes, *LAW OF FUTURE INTERESTS*, §530 (1936); *PROPERTY RESTATEMENT*, §403, *Comment e. and Ill. 2* (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §§24.47, 24.62 (1952).

⁵²⁴ *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N.W. 703 (1930), Part Two, note 535 *infra*; *Proprietors of the Church in Brattle Square v. Grant*, 3 Gray (69 Mass.) 142 (1855); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §247 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §530 (1936); *PROPERTY RESTATEMENT*, §229 (1936), §402, *Comment d.*, §403 *Comment e.* (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.47 (1952).

⁵²⁵ *PROPERTY RESTATEMENT*, §365 (1940), §403 (b) (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.47 (1952).

cumstances as if the donee of the power had made an effective appointment to himself or his estate.⁵²⁶

The problems which involve the most difficulty in the field covered by this chapter are those involving the validity of limitations which, if considered by themselves, do not violate the Rule Against Perpetuities, but which are contained in instruments limiting other interests that do violate the Rule. The otherwise valid limitations do not fail unless they are inseparably connected with the void limitations. The following sections of the chapter are devoted largely to consideration of various situations where such connection may exist. The statutes prohibiting suspension of the absolute power of alienation of land for more than two lives, which were in force in Michigan from 1847 to 1949,⁵²⁷ were a statutory substitute for the common-law Rule Against Perpetuities, and the problems relating to the consequences of violation of the statutes were, for most purposes, the same as those which relate to the consequences of violation of the common-law Rule. Hence it will be convenient to consider, in the sections which follow, Michigan cases determining the consequences of violation of the statutes as well as those determining the consequences of violation of the common-law Rule. Such precedents must be used with caution, however, because the theory and operation of the statutes differed from those of the common-law Rule. The common-law Rule Against Per-

⁵²⁶ PROPERTY RESTATEMENT, §365 (1940), §403 (c) (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.47 (1952). The property passes to the donee's estate rather than to the taker in default of appointment if it is found that the donee intended to exclude the donor from further control of it. Such a finding is usually made when the appointment is to a trustee on a trust which fails and when the appointment is made in a residuary clause which disposes of owned and appointive assets by the same words.

⁵²⁷ Part Two, note 47 *supra*; Part Three, note 1 *infra*.

petuities invalidates only *future* interests which may vest at a time beyond the period of the Rule; it does not limit the duration of trusts as such, only the vesting of future interests under or following them. The statutes, on the other hand, invalidated provisions, whether for *present* or future interests, which might suspend the absolute power of alienation for longer than two lives in being; hence they invalidated present trusts for receipt of the rents and profits of land which might last longer than two lives although the interests under and following the trusts were vested and, apart from the trusts, did not violate either the statutes or the common-law Rule.⁵²⁸

B. EFFECT ON PRIOR LIMITATIONS

When a limitation of a future interest violates the Rule Against Perpetuities, limitations of interests prior thereto, whether present or future, which do not themselves violate the Rule, take effect in accordance with their terms, unless the void limitation is so essential to the dispositive scheme of the transferor that it is inferable that he would not wish the prior limitations to stand alone.⁵²⁹ If Andrew Baker devises land to John Stiles, who has no children, for life, remainder to those children of John who reach twenty-five, the limitation of the life estate to John will ordinarily be effective even though the remainder violates the Rule.

⁵²⁸ Part One, note 593 *supra*; Chapter 20, Section C, *infra*.

⁵²⁹ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §247 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §530 (1936); *PROPERTY RESTATEMENT*, §402 (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.48 (1952); Annotation, 28 *A.L.R.* 375 (1924), 75 *A.L.R.* 124 (1931). That is, the prior limitations are presumptively valid. Illinois and Missouri appear to hold that they are presumptively invalid.

In *Wilson v. Odell*,⁵³⁰ land was devised to trustees to pay annuities to the testator's wife and children for their lives and to the children's children until the youngest grandchild came of age, and to distribute the principal to the children's children after the death of all the children and on the majority of the youngest grandchild. It was held that the limitations subsequent to the interests of the testator's children violated the statutes prohibiting suspension of the absolute power of alienation for more than two lives in being and so were void, but that the provisions for the annuities to the children were effective. In *Trufant v. Nunnelly*,⁵³¹ land was devised to three children for their lives, remainder to their "body heirs." It was held that the limitation of the remainder violated the suspension statutes, but that the life estates could take effect. In *State v. Holmes*,⁵³² land was devised to the testator's wife for life with alternative contingent remainders conditioned on events which might not occur for five years after her death to the State of Michigan and a grandson. It was held that the limitations in remainder violated the suspension statutes but that the life estate was valid. In *Rozell v. Rozell*,⁵³³ one farm was devised to testatrix's son Cass for life, remainder to his children for their lives, remainder to the heirs of such children in fee. Another farm was devised to testatrix's daughter Sarah for life, remainder to Cass for life, remainder to his children for life, remainder to the heirs of such children in fee. It was held that the remainders

⁵³⁰ 58 Mich. 533, 25 N.W. 506 (1885). The widow renounced her interest under the will. In *Palms v. Palms*, 68 Mich. 355, 36 N.W. 419 (1888), Part Two, note 561 *infra*, prior life interests were held valid although a subsequent trust violated the suspension statutes.

⁵³¹ 106 Mich. 554, 64 N.W. 469 (1895).

⁵³² 115 Mich. 456, 73 N.W. 548 (1898). See: *Gilchrist v. Corliss*, 155 Mich. 126, 118 N.W. 938 (1908).

⁵³³ 217 Mich. 324, 186 N.W. 489 (1922).

to the children of Cass were void because they violated a statute then in force prohibiting the limitation of life estates to unborn persons⁵³⁴ and that the remainders to their heirs violated the suspension statutes, but that the life estates of Cass and Sarah could take effect.

*Gettins v. Grand Rapids Trust Co.*⁵³⁵ is an excellent illustration of the effect on prior limitations of a subsequent limitation which is void under the common-law Rule Against Perpetuities. There, half the residue of an estate was devised to a trustee, with direction to convert land to personalty, to pay the income to testatrix's daughter Belle for life, and on her death to divide the corpus into as many shares as Belle should have children then surviving or with issue her surviving. The trustee was to pay one share to each child of Belle who had reached twenty-five and to the issue of each child who had predeceased Belle. The other shares were to be held on trust for each child until it reached twenty-five and then paid to it, but if any child died under twenty-five, its share was to go to its issue, or if none, the other children or their issue, and if all the issue of Belle were then dead, to a sister of Belle. The provisions for defeasance of the interests of children of Belle who survived their mother but died under twenty-five violated the Rule Against Perpetuities. It was held that the life interest of

⁵³⁴ Rev. Stat. 1846, c. 62, §17, Comp. Laws (1857) §2601; Comp. Laws (1871) §4084; Comp. Laws (1897) §8799; How. Stat. §5533; Comp. Laws (1915) §11535; Comp. Laws (1929) §12937; Mich. Stat. Ann., §26.17; Comp. Laws (1948) §554.17. Repealed by Act 38, P.A. 1949, Mich. Stat. Ann., §26.49 (2), Comp. Laws (1948) §554.52; Chapter 19 *infra*. The section read: "Successive estates for life shall not be limited unless to persons in being at the creation thereof; and when a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, . . ." The disposition of the second farm violated both clauses of this section.

⁵³⁵ 249 Mich. 238, 228 N.W. 703 (1930).

Belle was valid and that her surviving issue would take shares which would be indefeasible from the time of her death.

If a limitation of a future interest violates the Rule Against Perpetuities and the void interest is so essential to the dispositive scheme of the transferor that it is inferable that he would not wish prior limitations to stand alone, such prior limitations are also invalid. *St. Amour v. Rivard*⁵³⁶ involved a will which devised life estates in land to nine persons, with remainders for life to the children of the first tenants, remainders for life to the children's children, and so on forever, with cross remainders in the event of extinction of the descendants of any original taker. The will prohibited alienation forever of interests devised by it. Although the initial life estates and the remainders for life to the children of the first life tenants did not themselves violate the Rule, the Court decided that the testator's scheme was to create an indestructible perpetuity, and that since most of it must fail he probably would not wish any part to stand. Hence it held the whole will void, so that the land passed to the heirs of the testator as intestate property.

*Dean v. Mumford*⁵³⁷ involved a will which, as construed by the Court, devised land to trustees to pay income to the testator's wife for life, then to divide into five shares, transfer two to the testator's two daughters or their children, and hold the other three on separate trusts for testator's three sons and their wives, and on the death of each son and his wife, to transfer the principal of that son's trust to his children. The Court held that the trust provision for each son suspended the abso-

⁵³⁶ 2 Mich. 294 (1852), Part Two, note 39 *supra*. The testator died in 1841, before the enactment of the suspension statutes.

⁵³⁷ 102 Mich. 510, 61 N.W. 7 (1894). Cf. *Farrand v. Petit*, 84 Mich. 671, 48 N.W. 156 (1891).

lute power of alienation for the lives of (1) testator's wife, (2) the son's life, (3) the son's wife's life, and so the trusts were void under the statutes. The widow having renounced her interest under the will, the property was ordered distributed at once to the five children free of trust. The Court declined to decide whether the children took as devisees or as heirs at law of the testator. In *Niles v. Mason*,⁵³⁸ land was devised to trustees to pay an annuity to testator's sister Sarah for life and to pay the balance of the income to testator's children Charles and Lottie for their lives. On the death of either Charles or Lottie, half the principal was to be transferred to the children of the deceased child, or if none, held in trust for the other child and transferred on its death to its children. If both Charles and Lottie died without issue, the principal was to be transferred to testator's brother. It was held that these provisions suspended the absolute power of alienation for three lives, those of Sarah, Charles, and Lottie, and that they were all void except the annuity of Sarah, which the Court deemed sufficiently disconnected to be enforceable apart from the other provisions.

*Grand Rapids Trust Co. v. Herbst*⁵³⁹ involved a will which, after a \$1000 bequest to a business associate, devised an estate consisting of land and personalty on trust to pay life annuities to two nephews and a niece, and to pay the balance of the income to testator's son, a brother, and two sisters until the son reached twenty-five or died. When the son reached twenty-five or died, half the estate was charged with the annuities and payment of the balance of the income to the brother and sisters for

⁵³⁸ 126 Mich. 482, 85 N.W. 1100 (1901).

⁵³⁹ 220 Mich. 321, 190 N.W. 250 (1922). Accord, on similar facts: *Burke v. Central Trust Co.*, 258, Mich. 588, 242 N.W. 760 (1932).

life. Subject thereto, the son was to take the entire estate on reaching twenty-five; if he died under twenty-five, it was to be held on trust for his issue and transferred to them on reaching twenty-one. If the son died without issue or his issue died under twenty-one, the estate was to pass to four charities, subject to the provisions for the annuities and the brother and sisters. It was held that the bequest to the business associate was valid but that the other dispositions were so interconnected that the violation of the suspension statute by some of them caused all to fail.

In *Gardner v. City National Bank & Trust Co.*,⁵⁴⁰ the residue of an estate, consisting of land and personalty, was devised to trustees upon two trusts. Each trust was to pay the income to a daughter of the testator for life, then to her children. Each child was to receive half a share in principal at twenty-five and the other half at thirty. If any child died under thirty, its issue was to receive the income from its share until twenty-one and then the principal. If a child died under thirty without issue, its interest passed to the other children of the daughter or their issue on the same trusts, and if the daughter and all her issue died before the termination of the trusts, the principal of her trust was to be added to the principal of the similar trust for the other daughter and her issue. If both daughters and their issue died before termination, the property was to pass to testatrix's brother. The Court held that the trusts violated both the suspension statutes and the common-law Rule Against Perpetuities and that no part of them could be given effect without making a wholly new scheme for the testator, which the court declined to do.

⁵⁴⁰ 267 Mich. 270, 255 N.W. 587 (1934).

The Michigan cases just discussed indicate that, under both the common-law Rule Against Perpetuities and the suspension statutes, the invalidity of a future interest does not ordinarily affect the validity of prior interests. The last four cases considered appear to hold, on the other hand, that when a trust for receipt of the rents and profits of land was set up to last for longer than two lives in being, the entire trust was void; it would not be split and held valid for two lives but void as to the balance.⁵⁴¹

Professor Whiteside has remarked that under the Michigan decisions it is difficult, if not impossible, to point out any definite test for determining when invalid provisions will be eliminated from a testamentary disposition and the valid provisions sustained.⁵⁴² Most of the confusion has arisen, however, because the suspension statutes prohibit not only certain contingent future interests but also present trusts which might last longer than two lives in being. The repeal of the suspension statutes leaves only the common-law Rule Against Perpetuities, which is violated only by a future interest which may vest more remotely than the period of the Rule. Moreover, the period of the common-law Rule includes any number of lives in being plus twenty-one years in gross. Under the common-law Rule, there should seldom be occasion for striking down innocent prior interests merely because some subsequent interest is too remote.

⁵⁴¹ *Dean v. Mumford*, Part Two, note 537 *supra*; *Niles v. Mason*, Part Two, note 538 *supra*; *Grand Rapids Trust Co. v. Herbst*, Part Two, note 539 *supra*; *Gardner v. City National Bank & Trust Co.*, Part Two, note 540 *supra*; Part Three, notes 221, 222, *infra*. Cf. *Wilson v. Odell*, Part Two, note 530 *supra*.

⁵⁴² "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.45 (1952). New York appears to have developed more definite rules. *Id.* §25.28; *PROPERTY RESTATEMENT, App.*, Ch. A, ¶¶39-45 (1944).

C. EFFECT ON ALTERNATIVE AND CONCURRENT LIMITATIONS

When a limitation of a future interest violates the Rule Against Perpetuities, limitations of alternative and concurrent interests, which do not themselves violate the Rule, generally take effect in accordance with their terms unless the void limitation is inseparably connected with them, as it is when it is so essential to the dispositive scheme of the transferor that it is inferable he would not wish the otherwise valid limitations to stand alone.⁵⁴³ Completely disconnected limitations are almost always valid. Thus if a testator directs payment of his debts and of small legacies to servants and friends and devises the residue of his estate to a trustee to accumulate the income for a thousand years and pay the accumulated fund to his descendants then in being, the invalidity of the residuary clause does not prevent the provisions for payment of debts and legacies taking effect. Moreover, concurrent limitations may be separable although related to some extent to the void provision. *Bateson v. Bateson*⁵⁴⁴ was a suit by a settlor to set aside a deed of

⁵⁴³ 2 Simes, LAW OF FUTURE INTERESTS, §§529, 531 (1936); PROPERTY RESTATEMENT, §402, (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §§24.49, 24.50 (1952). It should be recalled, however, that if the interest of any member of the class may vest at a time beyond the period of the Rule, a class gift is wholly void, although the interests of some members are presently vested or will certainly vest within the period. Part Two, note 280 *supra*.

⁵⁴⁴ 294 Mich. 426, 293 N.W. 705 (1940). Three justices dissented on the ground the absolute power of alienation of the two tenths was not suspended beyond the life of James. Cf. *Lewis v. Nelson*, 4 Mich. 630 (1857). In *Wheelock v. American Tract Society*, 109 Mich. 141, 66 N.W. 955 (1896), the residue of an estate was devised to the executors to pay to four named charitable societies, with discretion to pay some to worthy poor girls to aid in their education. It was held that the provision for worthy poor girls was void for indefiniteness and that the provisions for the charitable societies were inseparable and so failed also. This was unsound; if the discretionary power to benefit poor girls was invalid, the four societies should have been held to take indefeasible interests. TRUSTS RESTATEMENT, §398 (2). There

trust. The plaintiff conveyed his land to his son George upon trust to pay the income to the settlor for life and at his death (1) to convey four tenths to George, if then alive, or to his named wife and son, (2) to hold four tenths upon trust to pay the income to the settlor's son Samuel for life and on his death to convey to his named wife and daughters, (3) to hold two tenths upon trust to pay the income to the settlor's grandson James for fifteen years and then to convey to James, but if James should die within the fifteen years, to convey to the wife and children of James, if any, otherwise one tenth to George and one tenth to the trust for Samuel. It was held that the disposition was void under the suspension statutes as to the two tenths, but that the other eight tenths were separable and valid.

If alternative limitations are made on verbally separate contingencies, the fact that one is invalid does not ordinarily prevent the other from taking effect.⁵⁴⁵ If Andrew Baker devises property to James Thorpe, who has no children, for life, remainder to his children, but if all his children die under twenty-five without surviving is-

are numerous cases holding wholly unrelated legacies valid although the principal dispositive provisions of the will were void. E.g. *Farand v. Petit*, 84 Mich. 671, 48 N.W. 156 (1891) (devise of land to sons and daughter good although trust of residue wholly void under suspension statutes); *State v. Holmes*, 115 Mich. 456, 73 N.W. 548 (1898) (\$2000 legacy to grandson valid although contingent remainders in residue violated the suspension statutes); *Otis v. Arntz*, 198 Mich. 196, 164 N.W. 498 (1917) (bequest to church valid although trust of residue violated suspension statutes); *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924) (bequest of tea set good although devise of land bad). There are numerous cases of this type in which the validity of the separate gifts was not questioned. See: *PROPERTY RESTATEMENT*, §376, *Comment c.*, §402, *Comment e.* (1944).

⁵⁴⁵ *Longhead ex dem. Hopkins v. Phelps*, 2 Black W. 703, 96 Eng. Rep. 414 (1770); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §331 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §§521, 531 (1936); *PROPERTY RESTATEMENT*, §376, *Comment e.* (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §§24.49, 24.54 (1952).

sue or if James dies without surviving issue, to John Stiles and his heirs, the contingency of James's children dying under twenty-five is too remote so John cannot take if James has surviving children, but the contingency of James's dying without surviving issue is not too remote so John will take if James dies without surviving issue. A verbally single contingency will not be split, however.⁵⁴⁶ If Andrew Baker devises property to James Thorpe, who has no children, for life, remainder to his children who reach twenty-five, but if there are no such children, to John Stiles and his heirs, John cannot take even though James dies without having had a child.

In *Michigan Trust Co. v. Baker*,⁵⁴⁷ testatrix devised land to her husband for life, remainder to a trustee to convert into money and hold for the benefit of her son Stuart for life. The will provided:

"If my said son shall have lawful child or children of his body who shall survive him, his share of my estate shall go to such child or children, girls at age of twenty-five years and boys at thirty years and not before.

"If my son Stuart shall die without lawful issue, his share of my estate shall go five thousand dollars (\$5,000) to my son Looe Baker in fee, and the remainder for his life and at his death to his lawful children, - - -."

Stuart died after the testatrix, without having had issue. It was held that the first quoted paragraph suspended the vesting of the interests of the children of Stuart for longer than lives in being and twenty-one

⁵⁴⁶ *Proctor v. Bishop of Bath and Wells*, 2 H. Bl. 538, 126 Eng. Rep. 594 (1794); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §332 (1915); 2 Simes, *LAW OF FUTURE INTERESTS*, §521 (1936); *PROPERTY RESTATEMENT*, §376, *Comment f.* (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 *AMERICAN LAW OF PROPERTY*, §24.54 (1952). In a few narrow situations the English courts developed exceptions to the rule that a single contingency cannot be split. Simes, *id.*, §§522-524.

⁵⁴⁷ 226 Mich. 72, 196 N.W. 976 (1924).

years and so violated the common-law Rule Against Perpetuities. The Court also held that the remainder limited to Looe and his children in the event of Stuart's death without issue failed because of the invalidity of the interest of the children of Stuart. The latter holding was clearly wrong. The contingencies were separately stated and that of Stuart's death without issue did not violate the Rule. As Stuart did die without issue, the remainder to Looe and his children should have been given effect.

In *Gettins v. Grand Rapids Trust Co.*,⁵⁴⁸ half of the residue of an estate was devised to a trustee to pay the income to testatrix's daughter Belle for life, and if Belle had issue then surviving, to divide into as many shares as Belle should have children then surviving or with issue her surviving. The trustee was to pay one share to each child of Belle who had reached twenty-five and to the issue of each child who had predeceased Belle. The other shares were to be held on trust for each child until it reached twenty-five and then paid to it. The will provided:

"- - - and in the event of the death of such child before the same shall reach the age of 25 years, my trustee shall pay, deliver and convey his or her special fund to my said daughter's children surviving, except this, that if any child has died with issue then surviving, said issue shall take the share the deceased child would receive if living and if at the death of any child my daughter has no issue then surviving, it shall pay, deliver and convey the special fund to my daughter, Shirley S. Thurston, if surviving, and to her issue, if she is deceased.

"If [upon the death of Belle] she has no issue then surviving I direct my trustee to pay, deliver and convey

⁵⁴⁸ 249 Mich. 238, 228 N.W. 703 (1930).

this trust fund to my said daughter, Shirley S. Thurston, if then surviving, and to her issue, if she is deceased."

It was held that the provisions of the first quoted paragraph for gifts over on the contingency of Belle's children dying under twenty-five were void under the Rule Against Perpetuities. The Court held, however, that the remainder to Shirley or her issue on the contingency of Belle's death without surviving issue could take effect in that event. As the contingencies were separately stated, this result was correct. When the problem arises again it is to be hoped that the Court will follow the sound rule of the *Gettins* case rather than the unsound one of the *Baker* case.

It will be recalled that under English law a remainder on an estate tail, which, of course, could not take effect unless the descendants of the first tenant in tail became extinct, was valid.⁵⁴⁹ As chattels real and personal could not be entailed, however, a limitation over on extinction of issue of a legatee of such interests violated the Rule Against Perpetuities.⁵⁵⁰ When freehold land and other property were devised by the same limitation, the dispositions of the freehold land and those of the other property were treated as separable.⁵⁵¹ If Andrew Baker, owning Blackacre in fee simple and an estate for a thousand years in Whiteacre, devised all his interests in land to James Thorpe and the heirs of his body and upon extinction of such heirs to John Stiles and his heirs, the limitation to John was valid as to Blackacre although void as to Whiteacre. A very similar problem arose in

⁵⁴⁹ Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §111 (1915); Part Two, note 155 *supra*.

⁵⁵⁰ *Burges v. Burges*, 1 Ch. Cas. 229, 22 Eng. Rep. 775 (1674); Gray, *RULE AGAINST PERPETUITIES*, 3rd ed., §212 (1915); Part Two, note 175 *supra*.

⁵⁵¹ *Forth v. Chapman*, 1 P. Wms. 663, 24 Eng. Rep. 559 (1720).

Michigan because the stringent provisions of the statutes prohibiting suspension of the absolute power of alienation, which were in force from 1847 to 1949, applied only to land, whereas limitations of personalty were restricted only by the more liberal provisions of the common-law Rule Against Perpetuities. If Andrew Baker devised his entire estate, consisting of land and personalty, to James Thorpe upon trust to pay the income to Lucy Baker for life, then to John Stiles for life, then to the issue of John Stiles for twenty years and to transfer the principal to the descendants of John in being at the end of the twenty years, the dispositions did not offend the common-law Rule but did violate the suspension statutes. Should the fact that the limitation was void as to land make it void as to personalty also? The early Michigan decisions indicated that it should not,⁵⁵² but later cases laid down an arbitrary rule that such limitations were not separable; if they failed as to land, they failed as to personalty also.⁵⁵³ The most extreme case of this type was *In re Richards' Estate*,⁵⁵⁴ where the fact that land worth \$800 was included in a limitation with

⁵⁵² *Toms v. Williams*, 41 Mich. 552 at 562, 2 N.W. 814 (1879); *Wilson v. Odell*, 58 Mich. 533, 25 N.W. 506 (1885); *Palms v. Palms*, 68 Mich. 355, 36 N.W. 419 (1888). But see concurring opinion of Champlin, J., in the latter case, 68 Mich. 355 at 380.

⁵⁵³ *State v. Holmes*, 115 Mich. 456, 73 N.W. 548 (1898); *Grand Rapids Trust Co. v. Herbst*, 220 Mich. 321, 190 N.W. 250 (1922); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934); *DeBuck v. Bousson*, 295 Mich. 164, 294 N.W. 135 (1940); PROPERTY RESTATEMENT, *App.*, Ch. B, ¶52 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.37 (1952); Leach & Tudor, "The Common Law Rule Against Perpetuities," *id.*, §24.50; Part Two, note 53 *supra*.

⁵⁵⁴ 283 Mich. 485, 278 N.W. 657 (1938). The desirability of this harsh and arbitrary rule was questioned by Butzel, J. in *Dodge v. Detroit Trust Co.*, 300 Mich. 575 at 598, 2 N.W. (2d) 509 (1942), where the land involved was worth some \$40,000 and the personalty about \$38,000,000.

personalty worth \$56,000 caused the entire limitation to fail.

The donee of a power of appointment sometimes exercises the power and disposes of his own property by the same limitation. If the limitation is invalid under the Rule Against Perpetuities insofar as it is an appointment, it would seem that it is nevertheless valid insofar as it disposes of the donee's own property.⁵⁵⁵ Suppose Andrew Baker devises Blackacre to John Stiles, who has no children, for life, remainder to such issue of John as John may by will appoint. John Stiles, owning Whiteacre, devises "all land over which I have power of disposition to my children for life, remainder to my grandchildren." As the period of the Rule Against Perpetuities is computed, in determining the validity of an appointment under such a limited testamentary power, from the death of Andrew,⁵⁵⁶ the limitation to the grandchildren of John violates the Rule so far as Blackacre is concerned. It would seem that it is valid as to Whiteacre.

If a limitation of a future interest violates the Rule Against Perpetuities and the void interest is so essential to the dispositive scheme of the transferor that it is inferable that he would not wish otherwise valid alternative or concurrent limitations to stand alone, such alternative or concurrent limitations also fail. This proposition is well illustrated by *In re Richards' Estate*.⁵⁵⁷ There a testator bequeathed \$1,000 to Willard G. Stone and devised one third of his estate to his daughter and two thirds to trustees to pay the income to his two sons for twenty years and then to transfer the principal to issue

⁵⁵⁵ Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.50 (1952). See: *Gilchrist v. Corliss*, 155 Mich. 126, 118 N.W. 938 (1908), Part Two, note 420 *supra*.

⁵⁵⁶ Part Two, note 322 *supra*.

⁵⁵⁷ 283 Mich. 485, 278 N.W. 657 (1938).

of the sons to be ascertained at that time. As the suspension statutes permitted no period in gross, the disposition of the two thirds was void. It was held that the legacy of Willard G. Stone could stand, but that the devise to the daughter of one third of the estate failed. As the Court observed, the testator probably intended to treat his children with approximate equality. If the disposition of the two thirds alone failed, it would pass as intestate property, so the daughter would receive one third plus two-ninths, or five-ninths of the estate, and each son would receive only two ninths. By eliminating the devise of one third to the daughter, the Court caused the entire estate, less the \$1,000 legacy, to pass as on intestacy to the three children equally.

D. EFFECT ON SUBSEQUENT LIMITATIONS

If a future interest is so limited that it may vest at a time beyond the period of the Rule Against Perpetuities, a subsequent interest limited to follow it or cut it off is usually such that it, too, may vest too remotely. In such a case both fail by reason of the direct operation of the Rule. In a few situations, however, it is possible to have a future interest which violates the Rule followed by an interest which is vested or will certainly vest within the period of the Rule. If Andrew Baker devises property to James Thorpe, who has no children, for life, remainder to the children of James who reach twenty-five for their lives, remainder to John Stiles and his heirs, the life estate of the children of James violates the Rule Against Perpetuities, but the remainder in fee of John Stiles is indefeasibly vested. If Andrew Baker bequeaths property to John Stiles, who has no children, for life, remainder to such issue of John as John may by will appoint, and John appoints by will "to my

daughters for their lives, remainder to their children for their lives, remainder to my son Henry and his heirs," the appointment to the children of the daughters violates the Rule, but the appointment to Henry vests upon the death of John, who was a life in being when Andrew died. Should such subsequent interests, themselves vested or certain to vest within the period of the Rule, fail merely because prior interests violate the Rule? The English cases suggest that they do,⁵⁵⁸ and Professor Gray accepted this view.⁵⁵⁹ The Restatement of Property and Professors Simes and Leach do not agree. They think that subsequent interests should be treated in the same way as prior, alternative and concurrent interests, that is, as valid unless the void intermediate limitation is so essential to the dispositive scheme of the transferor that it is inferable that he would not wish the subsequent limitations to stand if the intermediate interest fails.⁵⁶⁰

There are no American decisions on this problem. Michigan has, however, a number of decisions as to the closely related problem of the validity of interests which did not themselves violate the statutes prohibiting suspension of the absolute power of alienation for more than two lives but were limited to follow trusts which did violate the statutes.

⁵⁵⁸ *Monypenny v. Dering*, 2 De G.M.&G. 145, 42 Eng. Rep. 826 (1852); *Burley v. Evelyn*, 16 Sim. 290, 60 Eng. Rep. 885 (1848); *In re Mortimer*, [1905] 2 Ch. 502 (C.A.); *Re Backhouse*, [1921] 2 Ch. 51.

⁵⁵⁹ RULE AGAINST PERPETUITIES, 3rd ed., §251 (1915). He had expressed a contrary view in previous editions. Moreover he thought that the rule of nullity extended only to subsequent interests in fee, that, despite the English cases to the contrary, a life estate limited to a living person should be valid although preceded by a void interest. *Id.*, §§252-257.

⁵⁶⁰ PROPERTY RESTATEMENT, §402, *Comment d.* (1944); 2 Simes, LAW OF FUTURE INTERESTS, §532 (1936); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.51 (1952). Morris, "Ulterior Limitations and the Rule Against Perpetuities," 10 CAMB. L.J. 392 (1950), adopts this view.

In *Palms v. Palms*,⁵⁶¹ land and personalty were devised to trustees to pay the income to the testator's two children for their lives and then to transfer the principal to their children. The will provided that if any child was a minor at its parent's death, its share should be held on trust during minority. It was held that this provision for trusts to last beyond lives in being probably violated the suspension statutes but that both the prior and subsequent interests were valid, that is, the grandchildren would take on the deaths of their parents, free of the void trusts.

In *Dean v. Mumford*,⁵⁶² land was to be held on trust during the lives of the testator's widow, three sons, and the sons' wives, remainder to the children of the sons. The Court held that the trust for each son, his wife, and children, was separate from the others but that the whole disposition failed and the property involved passed as on intestacy. As the interest of the children of each son would vest in interest on the death of their father, a life in being at the death of the testator, it would seem that their interests were valid, apart from the trusts. It would have been possible to delete the trusts and hold the limitations to the children valid.

In *Niles v. Mason*,⁵⁶³ an estate was devised to trustees to pay a life annuity to the testator's sister Sarah and to divide the remaining income between the testator's two children, Charles and Lottie, for their lives. On the death of either child, half the principal was to be transferred to his children, if any, and if none, held on trust for the other child and transferred to his children at his death. If both died without issue, the principal was to

⁵⁶¹ 68 Mich. 355, 36 N.W. 419 (1888).

⁵⁶² 102 Mich. 510, 61 N.W. 7 (1894).

⁵⁶³ 126 Mich. 482, 85 N.W. 1100 (1901).

be transferred to testator's brother. It was held that the disposition created a trust for three lives and so violated the suspension statutes and that the estate passed to the heirs subject to the annuity to Sarah. It might have been possible to hold that the trusts for Charles and Lottie were separate, that each could last for the life of Sarah and the life beneficiary, with remainder to the children of the life beneficiary, and that nothing failed except the cross remainder to the other trust on the death of Charles or Lottie without issue. The decision rendered indicates unwillingness to find separate trusts when there are cross-remainders.⁵⁶⁴

In *Casgrain v. Hammond*,⁵⁶⁵ Ellen Hammond conveyed land to her son Charles, who executed an instrument of trust declaring that he would pay the net income to Ellen for life, and if she died before the expiration of fourteen years, he would pay it to five of her children, including himself. The instrument provided that the trust should last for fourteen years and until the death of Ellen if she lived longer. Upon its expiration Charles was to convey the land to the five children or the survivor or survivors of them. The trust was void because it suspended the absolute power of alienation for a period not based on lives. It was held that the land passed to the heirs of Ellen, who had died before the suit was commenced. The Court said that it did not pass to the five children who were *cestuis* of and remaindermen after the void trust because there was no intention to convey to them. This seems unsound. The trust instrument gave the five children an unconditional estate which vested in them immediately, subject only

⁵⁶⁴ See: PROPERTY RESTATEMENT, *App.*, Ch. A, ¶¶39, 40 (1944) *Cf.* Part Two, note 541 *supra*.

⁵⁶⁵ 134 Mich. 419, 96 N.W. 510 (1903).

to the void trust and to defeasance upon failure to survive. It would seem that the provision for the trust lasting beyond the life of Ellen could have been deleted and the balance of the disposition allowed to stand, so that the five children would take a remainder, indefeasible after the death of Ellen.⁵⁶⁶

In *Van Driele v. Kotvis*,⁵⁶⁷ a testator bequeathed \$500 to a church, to be paid out of the rents, issues, and profits of his estate at the rate of \$25 a year for twenty years and devised the residue to his wife for life, remainder to his daughter for life, remainder to the heirs of his wife and himself. It was held that the provision for the church was void but that this did not invalidate the disposition of the residue which was, of course, partly concurrent with and partly subsequent to the void interest.

*James E. Scripps Corporation v. Parkinson*⁵⁶⁸ involved the will of a testator who died in 1851, devising land to his wife upon trust until 1864, then one-third to the wife for life, and the balance, being a present estate as to two-thirds and a remainder after the widow's life estate as to the other third, in equal shares, one to each of testator's sons in fee and one to his daughter Jane for life, remainder to her heirs. It was held that because the trust, not being limited in duration by lives, was invalid, the whole will was void and the land passed

⁵⁶⁶ See: PROPERTY RESTATEMENT, *App.*, Ch. A, ¶64 (1944). But see Part Two, note 541 *supra*.

⁵⁶⁷ 135 Mich. 181, 97 N.W. 700 (1903).

⁵⁶⁸ 186 Mich. 663, 153 N.W. 29 (1915). There was earlier litigation over this will. *Parkinson v. Parkinson*, 139 Mich. 530, 102 N.W. 1002 (1905). It was held in the later case that the heirs of Jane did acquire an interest by purchase, not under the will but by virtue of her consent to a probate decree of partition in accordance with the terms of the void will. Thus the Court reached by indirect means the same result it should have reached by simply deleting the void trust and enforcing the subsequent provisions.. A similar result was reached by the same indirect means in *Snyder v. Potter*, 328 Mich. 236, 43 N.W. (2d) 922 (1950).

to the testator's heirs at his death, so that the heirs of Jane took nothing by purchase. This holding seems unsound. If the void trust, which suspended the absolute power of alienation for thirteen years in gross in violation of the statutes, were deleted, the other provisions of the will would be valid, since the limitation to the heirs of Jane would vest at her death, and these provisions should have been enforceable.

In *Otis v. Arntz*,⁵⁶⁹ a will directed that the income from the residue of an estate, consisting of a farm and personalty, be paid to the two children of the testator, Grace and Clark, "and in case of their decease to their heirs" for twenty-five years. The next paragraph devised the residue, subject to the preceding provision as to income, to the children's children in equal shares, "The share of any deceased grandchild shall go to his children if living, otherwise to revert to the surviving grandchildren." The following paragraph directed that the farm be kept intact, unsold and unmortgaged, until the expiration of twenty-five years, when it should be partitioned among the grandchildren or sold and the proceeds divided as directed in the preceding paragraph. A codicil provided that if Grace died within twenty-five years, her interest in the income should go to the children of Clark. It was held that these dispositions of the residue were wholly void under the suspension statutes and that the residue passed to the heirs at law of the testator. If, as the Court thought, a trust to last twenty-five years was intended, this result was probably sound, either on the ground that the will suspended the vesting of the grandchildren's interests for twenty-five years or on the ground that the testator would not want

⁵⁶⁹ 198 Mich. 196, 164 N.W. 498 (1917).

their interests to stand alone and be accelerated as to possession, because this would deprive his children of all benefit under the will. It would have been possible, however, to construe the will as devising a legal estate for twenty-five years to the children with a remainder to the grandchildren which would vest completely on the death of their parents. Such a twenty-five year term would be valid because the provision of the Michigan Constitution making void leases of agricultural land for agricultural purposes for terms of more than twelve years only applies to leases which reserve rent or services.⁵⁷⁰

*Scheibner v. Scheibner*⁵⁷¹ involved a will which, after provision for several legacies, devised the residue to trustees to pay the income to the testator's wife for life and after her death to pay \$75 a month to each of his two sons, Charles and William, until the expiration of twenty years after the testator's death, then to convert the estate into cash and pay it to the sons. Charles, during

⁵⁷⁰ Const. 1908, Art. XVI, §10, Part One, notes 306, 350, *supra*. However, even on this construction, the interest of the grandchildren would be void if its vesting was suspended for twenty-five years, because the statutes then provided, "A contingent remainder shall not be created on a term for years, unless the nature of the contingency upon which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof." Rev. Stat. 1846, c. 62, §20, Comp. Laws (1857) §2604; Comp. Laws (1871) §4087; Comp. Laws (1897) §8802; How. Stat., §5536; Comp. Laws (1915) §11538; Comp. Laws (1929) §12940; Mich. Stat. Ann., §26.20; Comp. Laws (1948) §554.20; repealed by Act 38, P.A. 1949, §2, Mich. Stat. Ann., §26.49 (2); Comp. Laws (1948) §554.52.

⁵⁷¹ 199 Mich. 630, 165 N.W. 660 (1917). See Part Two, note 541 *supra*. Subsequently the widow conveyed her interest, which had been enlarged as to a third from a life estate to a fee as a result of Charles's suit, to William. After her death, Charles sued unsuccessfully to set aside the conveyances on the ground of undue influence. *Scheibner v. Scheibner*, 220 Mich. 115, 189 N.W. 913 (1922). If he had never brought the first suit, Charles would have taken half the estate instead of only a third.

the widow's life, sought a decree that the provisions for a trust were invalid and that the residue should pass at once, free of trust, to the widow and sons as heirs at law. A motion to dismiss the bill on the ground there was an adequate remedy at law was overruled, and the order overruling it was affirmed in an opinion which intimated that the disposition of the residue was wholly void and that the residue passed to the widow and sons as heirs at law. This result seems unsound. The trust could have been sustained for the life of the widow, with immediate remainder to the sons, or the trust could have been deleted entirely and the widow given a legal life estate, with remainder to the sons.

*Loomis v. Laramie*⁵⁷² illustrates the type of result which could have been reached in *Scheibner v. Scheibner* and several other cases discussed above. There the residue of an estate was devised to trustees to accumulate the income for twenty years and transfer the accumulated fund to five named persons, "and the heirs of their body forever." The trust for accumulation violated both the suspension statutes and the accumulation statutes then in force. It was held, however, that the interests of the five named persons were vested and took effect at once. As these persons were not the heirs of the testator, they would have taken nothing if the void trust had been held to invalidate the limitations subsequent to it, as was the case in *Scheibner v. Scheibner*.

⁵⁷² 286 Mich. 707, 282 N.W. 876 (1938). In *DuBuck v. Bousson*, 295 Mich. 164, 294 N.W. 135 (1940), a will disposed of an estate to the testator's wife and children in fourteen paragraphs. The fifteenth provided that these devises and bequests should not be effective for a year after the testator's death. It was held that the fifteenth paragraph was void under the suspension statutes but that this did not affect the validity of the other provisions because its deletion would not materially alter the testator's plan. Cf. *Snyder v. Potter*, 328 Mich. 236, 43 N.W. (2d) 922 (1950).

It is thus apparent that our Supreme Court was willing, in some cases, to enforce limitations subsequent to trusts which were void under the suspension statutes if the deletion of the void trust did not unduly distort the transferor's dispositive scheme. It would seem that it should also be willing to enforce limitations subsequent to interests which violate the common-law Rule Against Perpetuities, under similar conditions. The purpose of the Rule is to prevent property being tied up for undesirably long periods, not to punish innocent transferees of interests which do not so fetter it.

PART THREE

THE TWO LIVES STATUTES

CHAPTER 18

The Statutory Scheme

A. THE STATUTES

CHAPTER 62 of the Michigan Revised Statutes of 1846, which became effective March 1, 1847, provided:

“Sec. 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter: Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed.

“Sec. 15. The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section.

“Sec. 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age.

“Sec. 17. Successive estates for life shall not be limited, unless to persons in being at the creation thereof; and when a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and upon the death of those per-

sons, the remainder shall take effect, in the same manner as if no other life estate had been created.

“Sec. 18. No remainder shall be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate, unless such remainder be in fee; nor shall any remainder be created upon such an estate in a term for years, unless it be for the whole residue of the term.

“Sec. 19. When a remainder shall be created upon any such life estate, and more than two persons shall be named as the persons during whose lives the estate shall continue, the remainder shall take effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced.

“Sec. 20. A contingent remainder shall not be created on a term for years, unless the nature of the contingency upon which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof.

“Sec. 21. No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

“Sec. 23. All the provisions in this chapter contained relative to future estates, shall be construed to apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years, shall not be suspended for a longer period than the absolute power of alienation can be suspended, in respect to a fee.

“Sec. 41. The delivery of the grant, where an expectant estate is created by grant; and where it is created by devise, the death of the testator, shall be deemed the time of the creation of the estate.”¹

¹ Rev. Stat. 1846, c. 62, §§14 to 21, 23, 41; Comp. Laws (1857) §§2598 to 2605, 2607, 2625; Comp. Laws (1871) §§4081 to 4088, 4090, 4108; Comp. Laws (1897) §§8796 to 8803, 8805, 8823; How. Stat., §§5530 to 5537, 5539, 5557; Comp. Laws (1915) §§11532 to 11539, 11541, 11559; Comp. Laws (1929) §§12934 to 12941, 12943, 12961; Mich. Stat.

These statutory provisions were frequently criticized.² Sections 14 through 20 and 23 were repealed by Act 38, Public Acts of 1949, which provided that the common-law Rule Against Perpetuities should thereafter be applicable to interests in Michigan land and that,

"Sec. 3. This act applies only to wills with respect to which the testator dies after the effective date of this act and to deeds and other instruments executed after the effective date of this act."³

The repealing act became effective September 23, 1949. The form of the repeal being such that it does not extend to limitations in instruments which became effective before that date, Michigan lawyers will be obliged to contend with the restrictive provisions of Chapter 62 of the Revised Statutes of 1846 for many years to come.

The quoted provisions of Chapter 62 of the Revised Statutes of 1846 were taken from the New York Revised

Ann., §§26.14 to 26.21, 26.23, 26.41; Comp. Laws (1948) §§554.14 to 554.21, 554.23, 554.41. As to the drafting of the Michigan statutes, see Part One, at note 582 *supra*. The judicial interpretation of these statutes is discussed in some detail in PROPERTY RESTATEMENT, *App.*, Ch. B, ¶¶50-58, 85 (1944), and Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §§25.36-25.47, 25.98 (1952), and in more summary fashion in 2 Simes, LAW OF FUTURE INTERESTS, §576 (1936) and Brake, "Satisfying Michigan's Perpetuity Rules," 5 UNIV. OF DETROIT L.J. 160 at 174-179 (1942).

² E.g. Chief Justice Campbell in *Toms v. Williams*, 41 Mich. 552 at 570, 572, 2 N.W. 814 (1879); Goddard, "Perpetuity Statutes: Some Reform Statutes in Need of Reformation," 22 MICH. L. REV. 95 (1923); Report of Committee on Revision of the Michigan Perpetuity Statutes, 1930, 10 MICH. ST. BAR J. 20 (1930); Report of the Committee on Legislation and Law Reform, 17 MICH. ST. BAR J. 393 at 403-405 (1938); Tripp, "The Michigan 'Two Lives' Rule," 28 MICH. ST. BAR J. 17 (Mar. 1949).

³ Mich. Stat. Ann., §§26.49 (1) to 26.49 (3); Comp. Laws (1948) §§554.51 to 554.53. See: Long, "Perpetuities and Accumulations: Recent Legislative Acts Explained," 17 DETROIT LAWYER 193 (1949); Sherrard, "Perpetuities in Michigan Today," 29 MICH. ST. BAR J. 5 (Mar. 1950); Waterbury, "Some Recent Statutory Changes in the Law of Perpetuities," 48 MICH. L.R. 158 at 1159-1164 (1950).

Statutes of 1829.⁴ The New York revisers explained their purpose as follows:

"Notwithstanding the abolition of estates tail, our law allows certain executory dispositions of land and the profits of land, by which the former may be rendered inalienable, and the latter may be made to accumulate for a life or lives in being, and twenty-one years thereafter. This limit is derived from the English law, and was originally adopted by the English judges from analogy to settlements by entail. A settlement on a parent for life, with remainder to his eldest son in tail, and any number of remainders over for life and in tail, could be barred by the son's suffering a recovery as soon as he came of age. Not to give a greater perpetuity to a disposition by executory devise, than the possible (and from the exigencies of society, even in that country, the general) limits of an entail, the courts held that no executory devise could be good, unless it must necessarily take effect within a life or lives in being, or twenty one years thereafter.

"When our legislature abolished entails, they left the

⁴Part Two, Ch. I, Tit. II, Art. First, §§14-21, 23, 41. As to the drafting of the New York statutes, see Part One at note 575 *supra*. The judicial interpretation of these statutes is discussed in detail in Chaplin, *SUSPENSION OF THE POWER OF ALIENATION, AND POSTPONEMENT OF VESTING, UNDER THE LAWS OF NEW YORK* (3rd. ed., 1928); Powell and Whiteside, *THE STATUTES OF THE STATE OF NEW YORK CONCERNING PERPETUITIES AND RELATED MATTERS* [New York Legislative Document (1936) No. 65 (H)]; *PROPERTY RESTATEMENT, App.*, Ch. A (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §§25.1-25.35, 25.92-25.96 (1952). In addition to Michigan, eleven other states (Arizona, California, Idaho, Indiana, Kentucky, Minnesota, Montana, North Dakota, Oklahoma, South Dakota, and Wisconsin) and the District of Columbia adopted parts of the New York statutory scheme. *PROPERTY RESTATEMENT, Appendix on the Statutory Rules Against Perpetuities, Introductory Note* (1944). Because of wide variation in the extent to which the scheme was adopted, no attempt has been made in this book to cite decisions from these jurisdictions interpreting the statutes. They are discussed in *PROPERTY RESTATEMENT, App.*, Ch. B (1944) and Whiteside, "Statutory Rules, Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §§25.1-25.5, 25.36-25.98 (1952).

common law in regard to executory limitations, unaltered; so that all we have gained by abolishing entails, is, that we have avoided the necessity of levying a fine or suffering a recovery to bar the estate tail. Indeed land may be rendered inalienable for a longer period by springing use, or executory devise, than by an entail. In the settlement of an estate tail, like that above mentioned, the life estate depends upon a single life; but in these executory dispositions, as the lives are not necessarily required to take any interest in the estate, or to be in any way connected with it, any number may be introduced, at the pleasure of the party, and for the mere purpose of protracting the period of alienation. In England this has often been done. In one case, twenty-eight persons (all of whom except seven, were strangers, taking no interest in the land,) were inserted for the purpose of securing the longest possible term. It is obvious that the chance of finding, out of so great a number a very long life, is much greater than in the case of the entail. Again: The term of twenty-one years in the case of the settlement by entail, only occurs during the actual infancy of the party entitled in remainder. In the case of the executory devise, &c. it is added to the life or lives in being, as an absolute term, and there may be cases, where, after the expiration of the twenty-one years, the real infancy of the party may be added to the former term thus rendering the land inalienable, except in special cases, for twenty-one years longer.

“In the case of the will of Peter Thelusson, the testator availed himself of the executory devise, to secure the accumulation of his personal estate, and the rents and profits of his realty, to such an extent, that the British parliament passed an act, (40 Geo. III. c. 98,) *‘to restrain all trusts and directions in deeds or wills, whereby the profits or produce of real or personal estates shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited.’*

“This act has not been re-enacted in this state; but in the preceding sections, the Revisers have proposed some

new regulations on this subject, which will considerably abridge the present power of rendering real estate inalienable; and in a subsequent section, they have restrained the accumulation of profits within still narrower limits than are now allowed in England.⁵ The difference between the preceding sections and the existing law, consists in the following particulars:

"1. Alienation cannot be protracted by means of mere nominees unconnected with the estate, beyond the period of two lives.

"2. No more than two successive estates for life can be created.

"3. The period of twenty-one years, after a life or lives in being, is no longer allowed as an absolute term; but the rule is restored to its original object, by being confined to the case of *actual infancy*, which is directly provided for by rendering the disposition defeasible, and allowing another to be substituted during that period.

"It is presumed that no argument need be advanced in favor of restricting, at least to the extent here proposed, the power of creating perpetuities. It is perhaps a more doubtful question, whether the genius of our government, and the state of our society, do not require that the right of suspending alienation should be still further reduced.

"It is proper to observe that these sections agree in some respects with the propositions contained in the recent work of Mr. Humphreys on the law of real property in England.

"It may be useful to illustrate by examples, the effect of §16, as its meaning may not be immediately obvious. Suppose an estate devised to *A for life, and upon his death, to his issue then living; but in case such issue shall die under the age of twenty-one years, or in case such issue shall die under the age of twenty-one years and without lawful issue, then to B in fee.* Here, in both cases, the remainder to B would be valid as embraced by

⁵ The statutes restricting accumulations, here referred to, are discussed in Chapter 16, *supra*.

the terms of the section; but if the devise were to *A for life, and after his death to B for the term of twenty-one years; and upon the expiration of such term, to the eldest male descendant of A then living, and if there be no such male descendant then living, to C in fee.* Here the period of twenty-one years being an absolute term, wholly unconnected with the infancy of any person entitled, both the term and all the remainders dependent on it would be void; and on the determination of the life estate, the fee would descend to the heirs of the testator. To prevent a possible difficulty in the minds of those to whom the subject is not familiar, we may also add, that an estate is never inalienable, unless there is a contingent remainder, and the contingency has not yet occurred. Where the remainder is vested as where the lands are given to A for life, remainder to B (a person then in being) in fee, there is no suspense of the power of alienation; for the remainderman and the owner of the prior estate, by uniting, may always convey the whole estate. This is the meaning of the rule of law prohibiting perpetuities, and is the effect of the definition in ¶14.”⁶

The Michigan statutes differed from those of New York in two important respects. First, the New York statutes contained complementary provisions forbidding suspension of the “absolute ownership” of personal property,⁷ so the statutory scheme there covered limitations of all types of property, real, personal, and mixed. The Michigan statutes contained no such complementary

⁶ Extracts from the Original Reports of the Revisers, 3 N.Y. Rev. Stat. (2d ed.) 571-573 (1836).

⁷ “§1. The absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator.

“§2. In all other respects, limitations of future or contingent interests in personal property, shall be subject to the rules prescribed in the first Chapter of this Act, in relation to future estates in lands.” N.Y. Rev. Stat., 1829, Part Two, Ch. IV, Tit. IV, §§1, 2.

provisions, so the statutory scheme here covered only limitations of land, including freehold estates and estates for years.⁸ Moreover, the Michigan Supreme Court held that if a will contained a mandatory direction to convert land into other property, the direction worked an equitable conversion and the statutory scheme did not apply.⁹ As has been seen, however, the Court extended the statutory scheme to mixed dispositions of land and personalty by refusing to treat them as separable.¹⁰ Second, Section 24 in the New York version of the statutes provided that "a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Article."¹¹ This provision was not adopted in Michigan. As the New York courts made it the basis for deciding that the statutory scheme prohibited remoteness of vesting as well as suspension of the absolute power of alienation,¹² its omission here is significant. The effect of this omission will be discussed in Chapter 20.

To the extent that the Michigan statutes were identical with those of New York, judicial interpretations of the statutes made in New York before 1846, when they were adopted in Michigan, were treated by our Supreme Court as virtually binding on it.¹³ Later New York ju-

⁸ Part Two, note 52 *supra*. As to the possibility that the scope of those sections of the statutory scheme which were not repealed by Act 38, P.A. 1949, was extended to include limitations of chattels personal by Act 227, P.A. 1949, see Part Two, note 184 *supra*.

⁹ Part Two, note 59 *supra*.

¹⁰ Part Two, notes 53, 553, 554, *supra*.

¹¹ N.Y. Rev. Stat. 1829, Part Two, Ch. I, Tit. II, Art. First, §24.

¹² *Matter of Wilcox*, 194 N.Y. 288, 87 N.E. 497 (1909); *Walker v. Marcellus and Otisco Lake Ry. Co.*, 226 N.Y. 347, 123 N.E. 736 (1919).

¹³ *State v. Holmes*, 115 Mich. 456, 73 N.W. 548 (1898), the theory being that, in adopting the New York statutes, the Michigan Legislature was presumed to have adopted the prior interpretation of them in New York. Controlling force was not accorded the decisions of inferior New York courts. *Foster v. Stevens*, 146 Mich. 131 at 141, 109 N.W. 265 (1906).

dicial decisions were accorded weight but not treated as binding.¹⁴

B. SUSPENSION OF THE ABSOLUTE POWER OF ALIENATION

The notes of the New York revisers quoted in the preceding section indicate that they thought the only effect of the statutes prohibiting suspension of the absolute power of alienation (Sections 14, 15 and 16) was to shorten the period of the common-law Rule Against Perpetuities by changing "any number of lives in being" to "two lives in being" and by eliminating the period of twenty-one years in gross. They did not think that they had changed the theory or nature of the Rule. That this was their understanding of the statutes which they had drafted is made evident by their statement, "an estate is never inalienable, unless there is a contingent remainder, and the contingency has not yet occurred." That statement was roughly true under English law because contingent future interests were inalienable at common law¹⁵ and the English courts would not enforce prohibitions on alienation of any other interest in property, legal or equitable.¹⁶ But the revisers evidently failed to realize fully that other provisions of their own revision changed the law on both these points by making contingent future interests alienable¹⁷ and the inter-

¹⁴ *Casgrain v. Hammond*, 134 Mich. 419, 96 N.W. 510 (1903); *Foster v. Stevens*, 146 Mich. 131, 109 N.W. 265 (1906); *Moore v. O'Leary*, 180 Mich. 261, 146 N.W. 661 (1914); *In re Coots' Estate*, 253 Mich. 208, 234 N.W. 141 (1931).

¹⁵ Part One, note 359 *supra*.

¹⁶ Part One, note 556 *supra*. There was an exception in the case of the separate equitable estate of a married woman. Part One, note 557 *supra*.

¹⁷ N.Y. Rev. Stat. 1829, Part Two, Ch. I, Tit. II, Art. First, §35; Part One, note 371 *supra*.

ests of beneficiaries of trusts for receipt of the rents and profits of land inalienable.¹⁸

If contingent future interests are alienable, such an interest limited to an ascertained living person does not suspend the absolute power of alienation, as such suspension is defined by Section 14,¹⁹ because there are persons in being by whom an absolute fee in possession can be conveyed. If Andrew Baker devises land to James Thorpe and his heirs so long as the Penobscot Building shall stand, remainder to John Stiles and his heirs, the remainder of John is contingent, but James and John are persons in being "by whom an absolute fee in possession can be conveyed." Hence, although the interest of John violates the common-law Rule Against Perpetuities, because it may vest too remotely, it does not suspend the absolute power of alienation.²⁰

On the other hand, as the New York courts soon held, a present trust for receipt of the rents and profits of land does suspend the absolute power of alienation because

¹⁸ N. Y. Rev. Stat. 1829, Part Two, Ch. I, Tit. II, Art. Second, §63; Part One, notes 580, 621, *supra*. It is virtually certain that the revisers did not realize that this would make present trusts suspend the absolute power of alienation. Powell and Whiteside, *THE STATUTES OF THE STATE OF NEW YORK CONCERNING PERPETUITIES AND RELATED MATTERS*, 56 [New York Legislative Document (1936) No. 65 (H)]; *PROPERTY RESTATEMENT, App.*, Ch. A, ¶17 (1944); Rundell, "The Suspension of the Absolute Power of Alienation," 19 MICH. L. REV. 235 at 249-251 (1921). Dean Rundell's article is an interesting and valuable commentary on all the topics treated in this section.

¹⁹ Part Three, note 1 *supra*.

²⁰ *Walker v. Marcellus and Otisco Lake Ry. Co.*, 226 N.Y. 347, 123 N.E. 736 (1919). But see *Leonard v. Burr*, 18 N.Y. 96 at 107 (1858). Although the interest of John in the example given does not suspend the absolute power of alienation, as such suspension is defined in Section 14, it would violate the portion of Section 24 which was not adopted in Michigan (Part Three, note 11 *supra*), because that portion of Section 24, like the common-law Rule Against Perpetuities, forbade remoteness of vesting. *Matter of Wilcox*, 194 N.Y. 288, 87 N.E. 497 (1909). Dean Rundell thinks that §§14 and 15 should have been construed to restrict remoteness of vesting. "The Suspension of the Absolute Power of Alienation," 19 MICH. L. REV. 235 at 259 (1921).

the interest of the *cestui que trust* is inalienable, although all interests in the land are vested.²¹ If Andrew Baker devises land to Roger White upon trust to receive the rents and profits and apply them to the use of James Thorpe and his heirs for ten years and then to convey the land to John Stiles, "there are no persons in being, by whom an absolute fee in possession can be conveyed," so the present trust suspends the absolute power of alienation for a period not limited to two lives in being, in violation of Section 15,²² although there are no unvested interests and hence no violation of the common-law Rule Against Perpetuities.

The decisions of the New York courts interpreting and applying the suspension statutes, rendered before 1846, when the statutes were adopted in Michigan, made it clear that, contrary to the view of the New York revisers, Sections 14, 15, and 16 did not merely shorten the period of the common-law Rule Against Perpetuities; they imposed restrictions on the creation of interests in property which, while they had the same general purpose as the common-law Rule, were of a quite different nature from that Rule and operated upon a different theory.²³ Whereas the common-law Rule prohibited all future interests

²¹ *Coster v. Lorillard*, 14 Wend. 265 (1835); *Hawley v. James*, 16 Wend. 61 (1836), Chapter 20, Section C, *infra*; Dean Rundell thinks that this rule is unsound. "The Suspension of the Absolute Power of Alienation," 19 MICH. L. REV. 235 at 251 (1921).

²² *Matter of Hitchcock*, 222 N.Y. 57, 118 N.E. 220 (1917). Section 15 is quoted above at Part Three, note 1.

²³ Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd. ed., §14 (1928); Walsh, *FUTURE ESTATES IN NEW YORK*, §23 (1931). Because the New York statutes were construed to prohibit remoteness of vesting as well as suspension of the absolute power of alienation (Part Three, note 12 *supra*), their theory and operation did not differ so radically from those of the common-law Rule as did the narrower Michigan statutes. The only prohibition on remoteness of vesting in the Michigan statutes is that in Section 20 (Part Three, note 1 *supra*) as to a contingent remainder on a term of years.

which might vest too remotely and had no application whatever to present and other vested interests, Sections 14 and 15²⁴ applied equally to vested and contingent interests, whether present or future, prohibiting all and only those which so affected the title to land that no persons in being could convey an absolute fee in possession.

Because the statutes were phrased in terms of suspension of the absolute power of alienation, they have tended to be confused, by both courts and lawyers, with the common-law rules against direct restraints on alienation which are the subject of Part One of this study. Those rules are distinct from and were not superseded or modified by the suspension statutes; the statutes did not permit any direct restraint on alienation which was void at common law.²⁵ At common law a prohibition or condition which would prevent or penalize the alienation of an estate in fee simple is void although the restraint will last for only a single day.²⁶ This rule was not abrogated by the suspension statutes.²⁷ A prohibition on alienation, if effective, would suspend the absolute power of alienation within the meaning of Section 14,²⁸ but, except in the case of spendthrift trusts,²⁹ all prohibi-

²⁴ Part Three, note 1 *supra*.

²⁵ 2 Simes, *LAW OF FUTURE INTERESTS*, §576 (1936); Brake, "Satisfying Michigan's Perpetuity Rules," 5 *UNIV. OF DETROIT L.J.* 160 at 166 (1942).

²⁶ *Mandlebaum v. McDonell*, 29 Mich. 78 at 107, 18 Am. Rep. 61 (1874), Part One, notes 138, 140, *supra*. The will involved in this case became effective before the suspension statutes.

²⁷ In re Estate of Schilling, 102 Mich. 612, *sub nom.* Moore v. Schindehette, 61 N.W. 62 (1894), Part One, note 154 *supra*; Porter v. Barrett, 233 Mich. 373, 206 N.W. 532, 42 A.L.R. 1267 (1925), Part One, note 158 *supra*; Smith v. Smith, 290 Mich. 143, 287 N.W. 411, 124 A.L.R. 215 (1939), Part One, note 167 *supra*; Braun v. Klug, 335 Mich. 692, 57 N.W. (2d) 299 (1953), Part One, note 162 *supra*.

²⁸ Part Three, note 1 *supra*.

²⁹ Part One, notes 569, 570, *supra*; Rose v. Southern Michigan National Bank, 255 Mich. 275, 238 N.W. 284 (1931), Part One, note 647 *supra*; Roberts v. Michigan Trust Co., 273 Mich. 91, 262 N.W.

tions on alienation of otherwise alienable interests in property are void under the common-law rules.³⁰ A condition subsequent restraining alienation would not suspend the absolute power of alienation within the meaning of Section 14. If Andrew Baker conveys land to John Stiles and his heirs "but if the grantee or his heirs shall attempt to alienate the estate hereby conveyed, the grantor or his heirs may enter and terminate the estate," Andrew and John are persons in being "by whom an absolute fee in possession can be conveyed," even if the condition were valid. But such a condition is void at common law and was not validated by the suspension statutes.³¹

The common-law rules against direct restraints on alienation, the common-law Rule Against Perpetuities, and the suspension statutes share a common purpose of keeping property alienable, but their scope is different. The common-law rules against direct restraints on alienation relate to provisions which would prevent an ascertained, living owner from alienating his own interest in property. The common-law Rule Against Perpetuities relates to future interests which indirectly restrain alienation of the full title to property because they are limited to persons unborn, who cannot convey, or on contingencies which are so uncertain as to make the interests commercially unmarketable. The suspension statutes related primarily to future interests which were inalienable because limited to unborn or unascertained persons and to interests under trusts which were made inalienable by statute. The suspension statutes, like the com-

744 (1935), Part One, note 651 *supra*; Hay v. Le Bus, 317 Mich. 698, 27 N.W. (2d) 309 (1947).

³⁰ Part One, notes 107, 244, 245, 297, 298, Part Three, notes 26, 27, *supra*.

³¹ Part Three, notes 26, 27, *supra*.

mon-law Rule Against Perpetuities, were aimed primarily at indirect restraints on alienation, limitations which do not in terms prohibit or penalize alienation but which have the indirect effect of making it difficult or impossible. They were designed to complement, not to supersede, the common-law rules against direct restraints on alienation.

C. SCOPE AND ARRANGEMENT OF PART THREE

The restrictions on the creation of life estates and remainders thereon imposed by Sections 17, 18, 19, and 21³² were peculiar to the statutory scheme and will be discussed in Chapter 19. Because, as has been seen, the class of interests which suspended the absolute power of alienation in violation of Sections 14 and 15³³ did not coincide in all respects with the class of interests which suspend vesting in violation of the common-law Rule Against Perpetuities,³⁴ Chapter 20 will be devoted to discussion of the types of limitations which could suspend the absolute power of alienation. As the period of suspension of the absolute power of alienation permitted by Sections 15 and 16 differs from the period of suspension of vesting permitted by the common-law Rule Against Perpetuities, the computation of the statutory period will be discussed in Chapter 21.

Although the statutory scheme differed from the common-law Rule Against Perpetuities as to the types of interests within its scope and as to the permissible period of suspension, it was a substitute for the common-law Rule, and many of the problems which arise under the common-law Rule arose and were solved in the same way

³² Part Three, note 1 *supra*.

³³ *Id.*

³⁴ Part Three, notes 20, 21, 23, *supra*.

under the statutes. The effect of destructibility of an interest, discussed in Chapter 10,³⁵ was similar under the statutory scheme to what it is under the common-law Rule.³⁶ Under the common-law Rule it has to be absolutely certain that an interest cannot vest at a time beyond the period of Rule,³⁷ and under the statutes it had to be absolutely certain that a suspension of the absolute power of alienation would not last longer than the statutory period.³⁸ When vesting was significant under the statutory scheme, the rules of vesting were the same as under the common-law Rule. Hence all of Chapter 11 has relevance to Part Three. The rules as to what constitutes a class gift, the composition of classes, and their closing were the same under the statutory scheme as at common law, so Chapter 12 is relevant to Part Three in these respects. The statutory definitions of absolute powers of revocation and disposition, discussed in Chapter 13,³⁹ applied under the statutory scheme. The application of the statutory scheme to charities has already

³⁵ Part Two at notes 69-81, *supra*.

³⁶ Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§55-84 (1928); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶14 (1944); White-side, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.15 (1952). But the doctrine of destructibility under the statutes differs from that under the common-law Rule in several important respects. Chapter 20, Subsection B (3), *infra*.

³⁷ Part Two, notes 122-124, 130, 131, *supra*.

³⁸ Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§51, 131, 132 (1928); Walsh, *FUTURE ESTATES IN NEW YORK*, §§26, 30 (1931); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶¶30-32, (1944); Chapter 21, Section B, *infra*. Thus the conclusive presumption that every person is capable of having issue as long as he lives applied under the statutes as at common law. *Rozell v. Rozell*, 217 Mich. 324, 186 N.W. 489 (1922), Part Two, note 145 *supra*; *PROPERTY RESTATEMENT, App.*, Ch. A, ¶31, Ch. B, ¶56 (1944). Similarly, the general rule that events occurring before the time when certainty is required can be considered in determining certainty but events occurring after that time cannot (Part Two, notes 125-129, *supra*) applied under the statutes; Chaplin, *id.*, §§89-92; *PROPERTY RESTATEMENT, App.*, Ch. A, ¶¶29, 30, Ch. B, ¶56 (1944), Chapter 21, Section B, *infra*.

³⁹ Part Two, notes 304-307, *supra*.

been discussed in Chapter 15.⁴⁰ The statutes regulating accumulations, which the New York revisers treated as an integral part of the statutory scheme, have been covered in Chapter 16. The consequences of violation of Sections 14 and 15⁴¹ have been discussed in Chapter 17. These and other problems arising under the Statutory scheme which have been adequately covered in Part Two will not be treated in Part Three other than by cross-references to the relevant discussions.

⁴⁰ Part Two, notes 404, 406, 407, 412, 423, 437, 438, *supra*.

⁴¹ Part Three, note 1 *supra*.

CHAPTER 19

The Restrictions on Life Estates

SECTIONS 17, 18, 19, and 21 of Chapter 62 of the Revised Statutes of 1846⁴² imposed several restrictions, unknown to the common law,⁴³ upon the creation of estates for life⁴⁴ in land and the limitation of remainders thereon. Section 16 of Chapter 63 provides,

“Every express trust, valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust; and the person for whose benefit the trust was created, shall take no estate or interest in the lands, but may enforce the performance of the trust in equity.”⁴⁵

In consequence, the interest of a life beneficiary under a trust is not an “estate for life” within the meaning of Sections 17, 18, 19, and 21 of Chapter 62, and those sections imposed no restrictions on the creation of beneficial interests under trusts; they related only to legal life estates.⁴⁶ It should be borne in mind, however, that the

⁴² Part Three, note 1 *supra*.

⁴³ PROPERTY RESTATEMENT, *App.*, Ch. A, ¶22 (1944). See: *Chene v. Bank of Michigan*, Walk. Ch. 511 (Mich. 1844).

⁴⁴ As to the meaning of the term “estate for life” and the various types of life estates, see Part One, *supra*, at note 234.

⁴⁵ Rev. Stat. 1846, c. 63, §16, Comp. Laws (1857) §2646; Comp. Laws (1871) §4129; Comp. Laws (1897) §8844; How. Stat., §5578; Comp. Laws (1915) §11580; Comp. Laws (1929) §12982; Mich. Stat. Ann., §26.66; Comp. Laws (1948) §555.16. As the Revised Statutes of 1846 constituted a single act, all of their provisions must be construed together. *Brayton v. Merithew*, 56 Mich. 166, 22 N.W. 259 (1885).

⁴⁶ *Conover v. Hewitt*, 125 Mich. 34, 83 N.W. 1009 (1900); *Sprague v. Moore*, 130 Mich. 92, 89 N.W. 712 (1902); *Ward v. Ward*, 163 Mich. 570, 128 N.W. 761 (1910); *Re Wager's Estate*, 295 Mich. 463, 295 N.W. 227 (1940); *McGraw v. McGraw*, 176 Fed. 312 (6th Cir. 1910) (affirming decree of U.S. Circuit Court, E. Dist., Mich., Harlan, Circuit Justice); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶26, Ch. B. ¶56 (1944); Whiteside, “Statutory Rules: Perpetuities and Accumulations,” 6 AMERICAN LAW OF PROPERTY, §25.96 (1952).

interest of a trustee is a legal estate. If the trustee's interest was an estate for life or a remainder following legal estates for life, it was subject to the restrictions of Sections 17, 18, 19, and 21, and its invalidity could affect other interests.⁴⁷

Section 17 prohibited the limitation of successive estates for life, "unless to persons in being at the creation thereof," and Section 21, which is still in force,⁴⁸ provides that "No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate." *Downing v. Birney*⁴⁹ involved a deed which, as construed by the Court, limited land to Lorainie Spicer for life, remainder to her children for life, remainder to Lorainie in fee. At the date of the conveyance Lorainie had two children, Mary and Diana, and two more were born later. Diana predeceased her mother. It was held that, as the interests limited to the children followed that of their mother, there were "successive life estates" involved within the meaning of Section 17 and that, under that section, the children born after the date of the conveyance could not take. The

⁴⁷ PROPERTY RESTATEMENT, *App.*, Ch. A, §26 (1944); Whiteside, *id.* Thus, if land was conveyed to James Thorpe for the life of Lucy Baker, upon trust for Lucy, with legal remainder to John Stiles for life, remainder to his children in fee, the remainder to John Stiles was void under Section 18, which provided, "No remainder shall be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate, unless such remainder be in fee; . . ." As Professor Whiteside and the *Restatement* have observed, the New York courts have sometimes failed to note this effect of the section.

⁴⁸ Section 21 was not included in the general repeal of the statutory scheme effected by Act 38, P.A. 1949, §2, Mich. Stat. Ann., §26.49 (2), Comp. Laws (1948) §554.52. As to the possibility that the scope of Section 21 was extended to include limitations of chattels personal by Act 227, P.A. 1949, see Part Two, note 184 *supra*.

⁴⁹ 117 Mich. 675, 76 N.W. 125 (1898). The language of the conveyance was partially construed on an earlier appeal, *Downing v. Birney*, 112 Mich. 474, 70 N.W. 1006 (1897), Part One, note 90 *supra*.

Court ruled that Mary and Diana took separate life estates, each in an undivided half of the land, and that Lorainie's life estate merged with her remainder in fee, as to half, on the death of Diana. It is to be noted that this decision seems to have treated the statute as altering the normal rules governing the closing of classes, under which the class "children of Lorainie" would not close until some member of it was entitled to possession, which was at the death of Lorainie.⁵⁰ This construction of the statute made it possible to treat the limitation to the children as valid.

In *Rozell v. Rozell*,⁵¹ a testatrix devised a 160-acre tract of land to her son Cass for life, remainder to the children of Cass for life, remainder to the heirs of such children in fee. At the time when the litigation arose, Cass had five children, four of whom were born before the death of the testatrix and one of whom was born four months thereafter. The Court said that a child *en ventre sa mere* is "in being" within the meaning of Section 17 but that the limitation of life estates to the children of Cass was void because the class would not close until the death of Cass and so children of Cass not in being at the death of the testatrix might take. This decision would seem to overrule *Downing v. Birney* on the question of whether Section 17 alters the normal rules as to the closing of classes.

As Section 21 is still in force, it must be considered in legal drafting. If Andrew Baker conveys land to John Stiles for life, remainder to the children of John for life, the remainder would violate Section 17, as construed in *Rozell v. Rozell*. But Section 17 has been repealed, so such a remainder may now be limited. If, however, the

⁵⁰ Part Two, notes 275, 276, *supra*.

⁵¹ 217 Mich. 324, 186 N.W. 489 (1922).

conveyance is to John Stiles for ten years if he shall so long live, remainder to the children of John for life, the remainder is void under Section 21 because the interest of the children is a "remainder on a term of years;" the class "children of John" will not close until the expiration of ten years or the earlier death of John and so may include children not in being at the testator's death. It should be noted that in neither example given in this paragraph would the remainder for life suspend either vesting or the absolute power of alienation for longer than a life in being.

The statutes under consideration did not prevent the limitation of estates for life to persons not in being except in the two situations mentioned in Sections 17 and 21, successive estates for life and remainders on estates for years. If Andrew Baker conveyed land to James Thorpe and his heirs, "but if James dies without issue alive at the time of his death, remainder to the children of John Stiles for life," the remainder was valid under the statutes.⁵² The interest of James was an estate in fee simple subject to defeasance, so the remainder to the children of John was neither a "successive estate for life" within the meaning of Section 17 nor a "remainder on a term of years" within the meaning of Section 21.

In addition to prohibiting the limitation of successive estates for life to persons not in being, Section 17 provided, "when a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and upon the death of those persons, the remainder shall take effect, in the same manner as if no other life estate had been created."⁵³ The most difficult

⁵² PROPERTY RESTATEMENT, *App.*, Ch. A, §23, Ill. 10 (1944).

⁵³ Part Three, note 1 *supra*.

problem of construction of this section which arose was that of what constituted "successive estates for life." As has been seen, the interests of beneficiaries under trusts, whether concurrent or successive, were not "estates for life" within the meaning of the section.⁵⁴ If a trust could not last longer than two lives in being, it did not violate Section 15, and Section 17 did not limit the number of successive beneficiaries. If John Stiles devised land to James Thorpe and his heirs upon trust "to pay the entire net income to my wife for her life, then to pay the net income to my children in equal shares and upon the death of each child, to pay his share in the income to his children in equal shares, but upon the death of my two youngest grandchildren living at the time of my death the trust shall terminate and the trustee shall convey the land to my issue then in being," all of the provisions of the devise were valid under both the suspension sections (14 and 15) and Section 17, even if John had ten children and each of them had children.

It is clear that if Andrew Baker devised land to Lucy Baker for life, remainder to James Thorpe for life, remainder to John Stiles for life, remainder to the children of John in fee, successive estates for life were involved and that of John was void under Section 17. Thus in *Hovey v. Nellis*,⁵⁵ a testator devised land to his widow for life, remainder to his son for life, remainder to the son's wife for life, remainder to the son's children in fee. The remainder to the son's wife was a third successive estate for life and so void under the statute. Similarly, in *Rozell v. Rozell*,⁵⁶ a testatrix devised a 143-acre tract of

⁵⁴ Part Three, note 46 *supra*.

⁵⁵ 98 Mich. 374, 57 N.W. 255 (1894).

⁵⁶ 217 Mich. 324, 186 N.W. 489 (1922). The remainder to the children of Cass also violated the provision against successive life estates to unborn persons. Part Three, note 51 *supra*. See also *Downing v. Birney*, Part Three, note 49 *supra*.

land to her daughter Sarah for life, remainder to her son Cass for life, remainder to the children of Cass for life, remainder to the heirs of such children in fee. The remainder to the children of Cass for life followed two prior life estates and so was void under the statute.

It is equally clear that concurrent life estates in separate shares of the same land, without cross-remainders to the survivors, are not "successive life estates." In *Woolfitt v. Preston*,⁵⁷ a testatrix devised land to her daughter Claudia for life, remainder to Martha and Florence for life, remainder to Helen and Ruth in fee. It was held that this was a valid disposition of an undivided half to Claudia for life, remainder to Martha for life, remainder to Helen and Ruth in fee, and of the other undivided half to Claudia for life, remainder to Florence for life, remainder to Helen and Ruth in fee.

The situation which has caused real difficulty is that of concurrent life estates in the same land with cross-remainders to the survivors and survivor of a group. This situation arises if Andrew Baker devises land to Lucy Baker, Roger White, and John Stiles, in equal shares, remainder on the death of any of these three to the survivors and survivor for life, remainder on the death of the survivor of the three to James Thorpe and his heirs. In this situation the New York decisions are to the effect that successive life estates are involved. If Lucy Baker dies first and Roger White next, the remainder in Lucy's third to Roger and John is good, but the remainder to John on the death of Roger fails as to the half of Lucy's third which passed to Roger

⁵⁷ 203 Mich. 502, 169 N.W. 838 (1918). Accord: *Felt v. Methodist Educational Advance*, 247 Mich. 168, 225 N.W. 545 (1929), Part Three, note 62 *infra*. Cf. *Le Baron v. Shepherd*, 21 Mich. 263 (1870).

on her death.⁵⁸ Michigan took a different approach. In *Case v. Green*,⁵⁹ land was conveyed to Hiram Case and Rebecca, his wife, for their lives, remainder after their deaths to Adelbert Case for life. The life estate of Adelbert was treated as valid, apparently on the theory that the interest of Hiram and Rebecca was a single estate for the life of the survivor. Similarly, in *Truitt v. City of Battle Creek*,⁶⁰ land was leased to Oliver Beauregard and his wife for life. On the same day the lessor conveyed the reversion to Truitt. Later Truitt conveyed the reversion to his mother, who reconveyed to Truitt for life, remainder to his heirs in fee. It was held that Truitt's life estate was not invalid as a third successive estate for life because the interest of Beauregard and wife was a single estate by the entirety for the life of the survivor.

In *Kemp v. Sutton*,⁶¹ a testator devised land to his wife and four sons "for and during their said natural lives," the wife to have a third of the income during her life, the sons to share the balance equally, and the survivors and survivor to take the whole, remainder on the death of the survivor to the City of Sault Ste. Marie. It was held that the whole disposition was valid; that the wife and sons took a single joint life estate for the life of the survivor rather than separate life estates with cross-remainders to the survivors and survivor. In *Felt v.*

⁵⁸ *Purdy v. Hayt*, 92 N.Y. 446 (1883); *In re Soley's Estate*, 150 Misc. 839, 271 N.Y. Supp. 595 (1934); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶24, (1944).

⁵⁹ 78 Mich. 540, 44 N.W. 578 (1889). See also *Russell v. Musson*, 240 Mich. 631, 216 N.W. 428 (1927).

⁶⁰ 205 Mich. 180, 171 N.W. 338 (1919), reversed on other grounds, 208 Mich. 618, 175 N.W. 578 (1920).

⁶¹ 233 Mich. 249, 206 N.W. 366 (1925). Accord: *Jones v. Snyder*, 218 Mich. 446, 188 N.W. 505 (1922). Cf. *Root v. Snyder*, 161 Mich. 200, 126 N.W. 206 (1910).

Methodist Educational Advance,⁶² a testator devised a farm to his wife for life, then,

"I give, devise and bequeath to my children, Joseph Elwell, George W. Elwell, and Rhody Conant, the use, improvement and income of my - - - farm - - - from and after the decease of my wife - - -, to have and to hold the same to the said Joseph Elwell, George W. Elwell and Rhody Conant for and during the term of their natural lives, - - - the same to be equally divided among them if requested by all or either of them; and from and immediately after the decease of the said Joseph Elwell, George W. Elwell and Rhody Conant, or either of them, the share set off to such deceased heir, I give, devise and bequeath to the heirs of said deceased heir, for him, her or them and their heirs and assigns forever."

The ultimate remainders were held valid in an opinion stating, "Our later cases hold that the devise of a life estate to a class collectively creates an estate for one life only, that of the 'longest liver' of the class, - - -." This language was unnecessary to the decision. In this case as in *Woolfitt v. Preston*,⁶³ there were no cross-remainders to the survivors and survivor. As to each third there was a life estate in the widow, a second successive life estate in a child, and a remainder in fee to the heirs of the child. The result was correct but the reasoning unsound.

Section 18 prohibited a remainder for life on an estate *pur autre vie*.⁶⁴ If Andrew Baker devised land to Lucy Baker for the life of Roger White, remainder to John Stiles for life, John's remainder was void although it was only the second successive estate for life.⁶⁵

⁶² 247 Mich. 168, 225 N.W. 545 (1929).

⁶³ Part Three, note 57 *supra*.

⁶⁴ Part Three, note 1 *supra*. As to estates *pur autre vie* see Part One, *supra*, at notes 234, 235, 238-241, 243.

⁶⁵ PROPERTY RESTATEMENT, *App.*, Ch. A, ¶25 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.95 (1952).

Section 19 provided that if a remainder was limited on an estate *pur autre vie* measured by more than two lives, the remainder should become possessory upon the expiration of the second life named.⁶⁶ If Andrew Baker devised land to Lucy Baker and her heirs for the lives of James Thorpe, Roger White, and Thomas Kempe, remainder to John Stiles and his heirs, John's remainder would become possessory upon the deaths of James and Roger. It should be noted, however, that Section 19 did not abbreviate an estate *pur autre vie* measured by more than two lives unless there was a remainder limited on it. If Andrew Baker conveyed land to Lucy Baker and her heirs for the lives of James Thorpe, Roger White, Thomas Kempe, and Edward Willis, the limitation was fully effective, and Andrew's reversion did not become possessory until James, Roger, Thomas, and Edward had died.⁶⁷

Estates *pur autre vie* unconnected with trusts have been uncommon here, but the duration of a trustee's estate is sometimes measured by the lives of the trust

⁶⁶ Part Three, notes 1, 65, *supra*. As Professor Whiteside observed, it is inferable that the measuring lives had to be those of persons in being.

⁶⁷ PROPERTY RESTATEMENT, *App.*, Ch. A, §25 (1944). Cf. *In re McBride's Estate*, 253 Mich. 305, 235 N.W. 166 (1931). All of the restrictions on the creation of life estates were relatively narrow in scope and could be avoided quite easily by a skillful draftsman. For example, in *Young v. Young*, 255 Mich. 173, 237 N.W. 535 (1931), Part One, note 608 *supra*, land was devised to a trustee to pay the income to the testator's two children for ten years if they should so long live, remainder to the children or the survivor of them for life, remainder on the death of the survivor to their issue. This was treated as wholly valid. Suspension of the absolute power of alienation would certainly cease on the death of the surviving child, so Sections 14 and 15 (Part Three, note 1 *supra*) were not violated. The trustee's estate was a term of years, so there were neither more than two successive estates for life within the meaning of Section 17, nor a remainder for life on an estate *pur autre vie* within the meaning of Section 18. All interests would vest on the death of the survivor of the two children, so Section 20 was not violated. The children were persons in being so their estates did not offend Section 21.

beneficiaries. Sections 18 and 19 could cause trouble in such situations. If Andrew Baker devised land to James Thorpe for the life of Lucy Baker, upon trust for Lucy, with legal remainder to John Stiles for life, remainder to his children in fee, it would seem that the remainder to John was void under Section 18.⁶⁸ Similarly, if Andrew Baker devised land to James Thorpe for the lives of Lucy Baker, Roger White, and John Stiles, upon trust to pay the income to Lucy, Roger, and John, and the survivor and survivors of them, legal remainder on the death of the survivor to the children of John Stiles in fee, it would seem that although the interests of Lucy, Roger, and John were not "successive estates for life" within the meaning of Section 17,⁶⁹ the remainder would have to take effect, if at all, under Section 19, on the deaths of Lucy and Roger although John was still alive. On the other hand, if the estate of the trustee was a fee simple, Sections 18 and 19 would not affect these dispositions at all. If Andrew Baker devised land to James Thorpe and his heirs upon trust to pay the income to Lucy Baker, Roger White, and John Stiles, and the survivors and survivor of them until the death of the survivor, and then to convey the land to the children of John Stiles in fee, Section 19 would have no application if the estate of James was a fee simple.⁷⁰ Under the decision in *Kemp v. Sutton*⁷¹ and the dictum in *Felt v. Methodist Educational Advance*,⁷² the trust would not suspend the absolute power of alienation for more than a single life, so the disposition would be wholly effective.

Sections 17 and 19⁷³ expressly provided that a re-

⁶⁸ Part Three, note 47 *supra*.

⁶⁹ Part Three, note 46 *supra*.

⁷⁰ PROPERTY RESTATEMENT, *App.*, Ch. A, ¶26 (1944).

⁷¹ Part Three, note 61 *supra*.

⁷² Part Three, note 62 *supra*. But see Chapter 21, Section C (3), *infra*.

⁷³ Part Three, note 1 *supra*.

mainder in fee subsequent to a life estate which was void or abbreviated under these sections should not fail but should be accelerated as to the time at which it became possessory. If the remaindermen in fee were ascertainable at the time when they became entitled to possession under these sections, the remainder did take effect at that time.⁷⁴ If Andrew Baker devised land to Lucy Baker for life, remainder to Roger White for life, remainder to James Thorpe for life, remainder to John Stiles and his heirs, the remainder of John was effective and became possessory on the deaths of Lucy and Roger. If, however, the remaindermen were not ascertainable at the time when the statutes entitled them to possession, the remainder failed.⁷⁵ If Andrew Baker devised land to Lucy Baker for life, remainder to Roger White for life, remainder to John Stiles for life, remainder in fee to the issue of John Stiles in being at the death of John, John's life estate was void and the remainder to his issue failed if he survived Lucy and Roger.

Even if one approves of the statutes prohibiting suspension of the absolute power of alienation, the additional restrictions on the creation of life estates imposed by the statutory scheme appear unnecessary and a trap for the unwary conveyancer. Now that the suspension statutes and the other restrictions on life estates have been repealed, the retention of Section 21 would seem to have no possible justification. It, too, should be repealed.

⁷⁴ *Hovey v. Nellis*, 98 Mich. 374, 57 N.W. 255 (1894), Part Three, note 55 *supra*; *Downing v. Birney*, 117 Mich. 675, 76 N.W. 125 (1898), Part Three, note 49 *supra*; PROPERTY RESTATEMENT, *App.*, Ch. A, ¶24 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.94 (1952)

⁷⁵ *Purdy v. Hayt*, 92 N.Y. 446, (1883); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶24 (1944); Whiteside, *id.* See: *Rozell v. Rozell*, 217 Mich. 324, 186 N.W. 489 (1922).

What Suspends the Absolute Power of Alienation?

SECTION 14 of Chapter 62, Revised Statutes of 1846, provided, "the absolute power of alienation . . . is suspended when there are no persons in being, by whom an absolute fee in possession can be conveyed."⁷⁶ Such suspension can be caused by (1) an indestructible future interest, (2) an indestructible power, and (3) an indestructible trust. These three forms of suspension will be considered in the following sections of this chapter.

A. INDESTRUCTIBLE FUTURE INTERESTS

A limitation of an indestructible future interest to a person or corporation not in being suspends the absolute power of alienation.⁷⁷ Such a person or corporation cannot convey his or its interest, so "there are no persons in being, by whom an absolute fee in possession can be conveyed." If Andrew Baker devises land to

⁷⁶ Rev. Stat. 1846, c. 62, §14, Comp. Laws (1857) §2598; Comp. Laws (1871) §4081; Comp. Laws (1897) §8796; How. Stat., §5530; Comp. Laws (1915) §11532; Comp. Laws (1929) §12934; Mich. Stat. Ann., §26.14; Comp. Laws (1948) §554.14. Repealed, Act 38, P.A. 1949, Mich. Stat. Ann., §26.49 (2); Comp. Laws (1948) §554.52.

⁷⁷ 2 Simes, LAW OF FUTURE INTERESTS, §576 (1936); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶10 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §§25.8, 25.39 (1952). Cf. Dodge v. Detroit Trust Co., 300 Mich. 575, 2 N.W. (2d) 509 (1942) (Corporation not in being). Future interests of persons not in being are subject to sale under court order on a showing that the rights of interested parties would otherwise be jeopardized [Part One, note 283 *supra*; Garrison v. Hecker, 128 Mich. 539, 89 N.W. 642 (1901)] but this does not prevent their suspending the absolute power of alienation.

John Stiles, who has no children, for life, remainder to the first son of John, the absolute power of alienation is suspended until John has a son. Similarly, a limitation of an indestructible future interest to a class, the membership of which may possibly include a person or corporation not presently in being, suspends the absolute power of alienation.⁷⁸ If Andrew Baker devises land to John Stiles for life, remainder to the children of John, the absolute power of alienation is suspended until the death of John because children who were not in being when the conveyance took effect may become members of the class. In *Trufant v. Nunneley*,⁷⁹ a testator devised three tracts of land, each to a named child for the life of that child. A later clause of the will devised the three tracts to "the body heirs of my said son and daughters, share and share alike." It was held that the latter limitation suspended the absolute power of alienation for three lives. The "body heirs" of the three children might include persons who came into being after the deaths of the first two.

A limitation of an indestructible future interest to a

⁷⁸ Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §210 (1928); Powell & Whiteside, *THE STATUTES OF THE STATE OF NEW YORK CONCERNING PERPETUITIES AND RELATED MATTERS*, 61 [New York Legislative Document (1936) No. 65 (H)]; *PROPERTY RESTATEMENT, App.*, Ch. A, ¶10 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §§25.8, 25.39 (1952).

⁷⁹ 106 Mich. 554, 64 N.W. 469 (1895). See also: *Paton v. Langley*, 50 Mich. 428, 15 N.W. 537 (1883); *Farrand v. Petit*, 84 Mich. 671, 48 N.W. 156 (1891); *Defreese v. Lake*, 109 Mich. 415, 67 N.W. 505 (1896); *Cole v. Lee*, 143 Mich. 267, 106 N.W. 855 (1906); *Otis v. Arntz*, 198 Mich. 196, 164 N.W. 498 (1917); *Cary v. Toles*, 210 Mich. 30, 177 N.W. 279 (1920); *Rozell v. Rozell*, 217 Mich. 324, 186 N.W. 489 (1922); *Russell v. Musson*, 240 Mich. 631, 216 N.W. 428 (1927); *Felt v. Methodist Educational Advance*, 247 Mich. 168, 225 N.W. 545 (1929); *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N.W. 703 (1930); *Burke v. Central Trust Co.*, 258 Mich. 588, 242 N.W. 760 (1932); *In re Richards' Estate*, 283 Mich. 485, 278 N.W. 657 (1938).

person or persons so described that neither the takers nor the group from among whom the takers are to be selected are presently ascertainable suspends the absolute power of alienation.⁸⁰ No person or group of persons (except the whole populace) can convey the future interest, so "there are no persons in being, by whom an absolute fee in possession can be conveyed." If Andrew Baker devises land to John Stiles for life, remainder to the person who is Governor of Michigan when John dies, the absolute power of alienation is suspended until the death of John.

Vested future interests are, by their nature, owned by persons who are in being and ascertained. There has never been any doubt that a vested future interest, not subject to a trust, does not suspend the absolute power of alienation.⁸¹

The notes of the New York revisers give the impression that they thought that a contingent future interest suspends the absolute power of alienation, although limited to a presently ascertainable living person.⁸² This would mean that the suspension statutes, like the com-

⁸⁰ *Leonard v. Burr*, 18 N.Y. 96 at 107 (1858); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶10 & Ill. 3 (1944). Cf. *Moss v. Axford*, 246 Mich. 288, 224 N.W. 425 (1929), Part Three, note 96 *infra*.

⁸¹ *Toms v. Williams*, 41 Mich. 552, 2 N.W. 814 (1879); *Chambers v. Shaw*, 52 Mich. 18, 17 N.W. 223 (1883) (vested interest in child *en ventre sa mere*); *Case v. Green*, 78 Mich. 540, 44 N.W. 578 (1889); *Hovey v. Nellis*, 98 Mich. 374, 57 N.W. 255 (1894); *Hull v. Osborn*, 151 Mich. 8, 113 N.W. 784 (1908); *McInerny v. Haase*, 163 Mich. 364, 128 N.W. 215 (1910); *Kemp v. Sutton*, 233 Mich. 249, 206 N.W. 366 (1925); *Rodey v. Stotz*, 280 Mich. 90, 273 N.W. 404 (1937); *In re Dingler's Estate*, 319 Mich. 189, 29 N.W. (2d) 108 (1947). The statement in the text should be read with the qualification that a limitation to a class which may open to admit persons not presently in being or not presently ascertainable suspends the absolute power of alienation although the interests of those members of the class who are in being and ascertained are vested. Part Three, notes 78, 79, *supra*. It is not the vested interests which cause the suspension, however, so the statement in the text is literally accurate.

⁸² Part Three, note 6 *supra*.

mon-law Rule Against Perpetuities, prohibited remoteness of vesting as such. Because contingent future interests were inalienable at common law,⁸³ their existence did suspend the absolute power of alienation. But contingent future interests are alienable under the New York and Michigan statutes,⁸⁴ so the existence of such an interest does not prevent conveyance of an "absolute fee in possession" if all possible takers are ascertained living persons. If Andrew Baker conveys land to James Thorpe and his heirs so long as the Penobscot Building stands, remainder to John Stiles and his heirs, the interest of John is contingent, but James and John are "persons in being, by whom an absolute fee in possession can be conveyed." Similarly, if Andrew Baker devises land to John Stiles, who has four sons, for life, remainder to that son of John now living who makes the best grades in college, the remainder is contingent until all of John's living sons finish college, but John and his four sons are "persons in being, by whom an absolute fee in possession can be conveyed."

The New York Revised Statutes of 1829 contained two provisions which expressly prohibited remoteness of vesting. Sections 20 and 24 provided,

"§20. A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited, be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof.

"§24. - - - a fee may be limited on a fee, upon a

⁸³ Part One, note 359 *supra*.

⁸⁴ N.Y. Rev. Stat. 1829, Part II, Ch. I, Tit. II, Art. First, §35; Part One, note 371 *supra*.

contingency, which, if it should occur, must happen within the period prescribed in this Article.”⁸⁵

Accordingly, it has been held in New York that a future interest in fee limited on a fee is void unless certain to vest within the statutory period, even though it is limited to an ascertained living person who could convey it.⁸⁶ This is not because such a future interest suspends the absolute power of alienation, but because Section 24 of the New York statute so provided. The quoted portion of Section 24 was not adopted in Michigan; the only provision against remoteness of vesting, as such, in the Michigan statutory scheme being that of Section 20.

In several of the earlier cases, the Michigan Supreme Court fell into the same error as the New York revisers by deeming suspension of the absolute power of alienation synonymous with suspension of vesting. Thus in *Toms v. Williams*,⁸⁷ Chief Justice Campbell said,

⁸⁵ N.Y. Rev. Stat. 1829, Part II, Ch. I, Tit. II, Art. First, §§20, 24; Rev. Stat. 1846, c. 62, §20, Comp. Laws (1857) §2604; Comp. Laws (1871) §4087; Comp. Laws (1897) §8802; How. Stat., §5536; Comp. Laws (1915) §11538; Comp. Laws (1929) §12940; Mich. Stat. Ann., §26.20; Comp. Laws (1948) §554.20. Repealed, Act. 38, P.A. 1949, Mich. Stat. Ann., §26.49 (2); Comp. Laws (1948) §554.52. The quoted portion of Section 24 was not adopted in Michigan. It is arguable that the provision of Section 23 (Part Three, note 1 *supra*) that “the absolute ownership of a term of years, shall not be suspended for a longer period than the absolute power of alienation can be suspended, in respect to a fee,” prohibited remote vesting of future interests in chattels real. See: PROPERTY RESTATEMENT, *App.*, Ch. B, ¶53 (1944); Whiteside, “Statutory Rules: Perpetuities and Accumulations,” 6 AMERICAN LAW OF PROPERTY, §25.40 (1952).

⁸⁶ Matter of Wilcox, 194 N.Y. 288, 87 N.W. 497 (1909) (shifting interest); Walker v. Marcellus and Otisco Lake Ry. Co., 226 N.Y. 347, 123 N.E. 736 (1919) (springing interest); 2 Simes, LAW OF FUTURE INTERESTS, §567 (1936).

⁸⁷ 41 Mich. 552, at 562, 2 N.W. 814 (1879). Quoted with approval in Hull v. Osborn, 151 Mich. 8 at 13, 113 N.W. 784 (1908). There is similar confusion of suspension of the absolute power of alienation with suspension of vesting in the opinion in *McInerny v. Haase*, 163 Mich. 364 at 368, 128 N.W. 215 (1910). See also opinion of Champlin, J., in *Palms v. Palms*, 68 Mich. 355 at 385-386, 36 N.W. 419 (1888).

"The statutes restricting perpetuities are confined to avoiding future estates that are made more remote in their vesting than two lives in being, and such arrangements as serve to postpone them. In all cases where the application of the rules against perpetuities is invoked, the character of the interest as vested or otherwise is the turning consideration. Revisor's note to Part 2, Ch. 1, New York Revised Statutes."

In one case, *State v. Holmes*,⁸⁸ the erroneous notion that a limitation of a contingent future interest to an ascertained person suspends the absolute power of alienation controlled the decision. There the residue of an estate was devised to the testator's wife for life, remainder, if the State of Michigan should accept and by due enactment within five years after the death of the wife erect a public educational or charitable institution on the devised land, to the State, otherwise to the testator's grandson. The Court held both limitations in remainder void, saying that a condition precedent suspends the absolute power of alienation and that all of the parties together could not convey an absolute fee in possession until the performance of the condition or the expiration of five years after the widow's death, a period in gross not permitted by Section 15.⁸⁹ This decision was unsound. The limitations in remainder did suspend vesting for a period which might extend five years beyond a life in being, but the alternative contingent remainders of the State and the grandson were

⁸⁸ 115 Mich. 456, 73 N.W. 548 (1898). The decision might be defended under the ancient rule that when property was conveyed to a public or charitable corporation with a restriction, express or implied, to use for a public or charitable purpose, the corporation was incapable of alienating the property. Part One, note 219 *supra*. The difficulty with this theory is that it would have made all limitations of present vested interests to public and charitable corporations illegally suspend the absolute power of alienation, which they did not. Part Two, notes 396-400, *supra*.

⁸⁹ Part Three, note 1 *supra*.

alienable, so they could unite to convey an absolute fee in possession from the moment of the widow's death. Indeed, the absolute power of alienation was not even suspended during the widow's lifetime, since she could join the State and the grandson in a conveyance of the fee.

The later Michigan decisions make it clear that a contingent future interest does not suspend the absolute power of alienation if there are persons in being who can unite to convey an absolute fee in possession; that suspension of the absolute power of alienation is not synonymous with suspension of vesting.⁹⁰ This was first clearly recognized in *Torpy v. Betts*,⁹¹ where land was devised to the testator's widow for life, remainder to her son Frank in fee, on condition that he or his representatives pay \$500 to her daughter Grace or her legal representatives. As the Court observed, even if the provision for payment of \$500 was a condition precedent to the vesting of the remainder which might be performed at a time beyond two lives in being, Frank and Grace or their issue could convey an absolute fee in possession after the death of their mother. The opinion stated, "if an estate must go to persons *in esse*, the power of alienation would never be suspended, as, by joining, the owners of the various estates could always convey the fee."⁹² In *Fitzgerald v. City of Big Rapids*,⁹³ a testatrix devised

⁹⁰ 2 Simes, *LAW OF FUTURE INTERESTS*, §576 (1936); *PROPERTY RESTATEMENT, App.*, Ch. B, ¶53 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.40 (1952). See: Brake, "Satisfying Michigan's Perpetuity Rules," 5 *UNIV. OF DETROIT L.J.* 160 at 176 (1942).

⁹¹ 123 Mich. 239, 81 N.W. 1094 (1900). There were alternative contingent limitations of the remainder in the event of Frank's predeceasing his mother without surviving issue (1) to Grace, (2) if Grace predeceased her mother without surviving issue, as the mother should appoint.

⁹² 123 Mich. 239 at 243.

⁹³ 123 Mich. 281, 82 N.W. 56 (1900).

her homestead to her executor to convey to the city, if it would agree to maintain a free public library thereon forever, such conveyance to be subject to a provision that if the premises were used for other purposes or not used for library purposes for three years, the land should "revert" to named legatees. If the city should not agree to those terms, the executor was directed to sell the land and pay the proceeds to the named legatees. These provisions were held valid, the Court saying, "If there are in existence persons who, by joining in a conveyance or by successive releases, are able to pass the whole estate, the requirements of the statute are met."⁹⁴ This decision would seem to overrule that in *State v. Holmes*,⁹⁵ where the limitations were virtually identical.

In *Russell v. Musson*,⁹⁶ land was devised to Guy and Clara, his wife, jointly, for their lives, remainder to the children of Guy surviving him. After the deaths of Guy and Clara, if Guy died without children, the land was devised to Josiah and Hannah in equal shares in fee, charged with support of their mother. If Josiah or Hannah should die without issue, his share was to pass to the survivor, and if both should die without issue, the

⁹⁴ 123 Mich. 281 at 283. In *Windiate v. Lorman*, 236 Mich. 531, at 534, 211 N.W. 62 (1926) it was held that a perpetual option to purchase did not suspend the absolute power of alienation, "because at all times there were persons in being by whom an absolute fee in possession could have been conveyed."

⁹⁵ Part Three, note 88 *supra*.

⁹⁶ 240 Mich. 631, 216 N.W. 428 (1927). In *Moss v. Axford*, 246 Mich. 288, 224 N.W. 425 (1929), testatrix devised the residue of her estate to her executor "with the instructions to pay the same to the person who has given me the best care in my declining years and who in his opinion is the most worthy of my said property." This probably suspended vesting until the executor designated the residuary legatee and no measuring lives were specified, but it was held valid, the Court saying, "The will provided no restriction on alienation. The beneficiary, whoever it might be, was in being, and she and the trustee could have conveyed an absolute fee at any time." This was correct if it be assumed that the class of persons from which the executor could select was ascertainable.

land was to pass to their mother, Sarah, in fee. This disposition of the ultimate remainder suspended vesting for three lives, those of Guy, Josiah, and Hannah, but it was held valid because it did not suspend the absolute power of alienation beyond the life of Guy. On his death Clara and his children could convey a fee or, if there were no children, Clara, Josiah, Hannah, and Sarah could together convey an absolute fee in possession.

*Michigan Trust Co. v. Baker*⁹⁷ involved the validity of a will which devised land to the testatrix's husband until his death or remarriage, remainder to a trustee to convert the land into money and hold the money on trust for various persons. In holding that the direction to convert prevented suspension of the absolute power of alienation for more than one life, the Court said,

"It must be kept in mind that, while the rule against perpetuities applies to future interests in both real and personal property, it has nothing to do with the statutory prohibition against suspension of power of alienation. The rule requires vesting of estates within a period, while the statute prohibits inalienability beyond a period; the rule is a restraint only upon future interests and has no concern with present interests; the statute reaches vested estates in real property but shorn of alienability."⁹⁸

In *Rodey v. Stotz*,⁹⁹ a will provided that the testator's nephew Adolph should have the use, income benefit, and control of property devised to Adolph's children until the youngest of the children attained the age of twenty-one, and that the testator's nephew Fred should have like enjoyment of property devised to Fred's chil-

⁹⁷ 226 Mich. 72, 196 N.W. 976 (1924).

⁹⁸ 226 Mich. 72 at 76-77. Quoted with approval in *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270 at 287, 255 N.W. 587 (1934).

⁹⁹ 280 Mich. 90, 273 N.W. 404 (1937).

dren until the youngest of these attained the age of twenty-one. Subject to these provisions, all the property was devised to four named children of Adolph and four named children of Fred, share and share alike. The Court, in holding that the remainders vested in the eight children of the nephews on the death of the testator and that the dispositions were fully valid, said,

"There is no suspension of the power of alienation when there are ascertainable persons in being, who together can convey an absolute fee or interest in possession and this whether their interests are vested or contingent - - -

"- - - The question, however, is raised whether 3 Comp. Laws 1929, §§12934, 12935,¹⁰⁰ lay down a rule as to remoteness of vesting in addition to a rule regarding the suspension of the power of alienation. This question is raised and answered in 2 Simes, *Future Interests*, p.481, in which it is stated:

" 'Is the power of alienation illegally suspended if there is a contingent future interest which may not vest within lives in being, even though there is a group of ascertained persons who may alienate in fee simple absolute? In other words, do these statutes lay down, not merely a rule as to the legal power of alienation, but also a rule as to remoteness of vesting? While the matter is not free from doubt, it would seem that the statutes are not regarded as announcing any rule as to remoteness of vesting.' " ¹⁰¹

As has been seen, because courts of equity will compel specific performance of irrevocable options concerning land, an option to purchase land or to renew a lease is, in reality, an equitable future interest which is contingent upon notice and payment of the price or rent.¹⁰² As the optionor and optionee can unite to convey an ab-

¹⁰⁰ Rev. Stat. 1846, c. 62, §§14, 15, Part Three, note 1 *supra*.

¹⁰¹ 280 Mich. 90 at 95, 99-100.

¹⁰² Part Two, notes 362, 364, *supra*.

solute fee in possession, an option does not suspend the absolute power of alienation within the meaning of Section 14.¹⁰³ Section 20, however, prohibited a contingent remainder on a term of years unless the nature of the contingency was such that the remainder must vest in interest within two lives in being.¹⁰⁴ Moreover, Section 24 of the New York statute prohibited a contingent limitation on a fee upon a contingency which might not occur within the statutory period.¹⁰⁵ It is arguable that an option to renew a lease is a contingent remainder on a term of years within the meaning of Section 20 and that an option to purchase the fee is a contingent limitation of a fee on a fee. Nevertheless, in both New York and Michigan, options to purchase and to renew leases, not limited in duration to two lives in being, were held valid.¹⁰⁶

Reversions are vested future interests.¹⁰⁷ Possibilities of reverter and rights of entry on breach of condition subsequent are, in some sense, contingent future interests.¹⁰⁸ These interests do not suspend the absolute power of alienation because they are always held by living persons who can unite with the owner of the fee subject to

¹⁰³ Part Three, notes 1, 76, *supra*. Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §179 (1928).

¹⁰⁴ Part Three, note 85 *supra*.

¹⁰⁵ *Idem*.

¹⁰⁶ Option to purchase fee: *Matter of City of New York*, 246 N.Y. 1, 549, 157 N.E. 911, 159 N.E. 646 (1927), *cert. den.*, 276 U.S. 603 (1928), Part Two, note 370 *supra*; *Windiate v. Lorman*, 236 Mich. 531, 211 N.W. 62 (1926), Part Two, note 369 *supra*; Michigan cases cited in Part Two, notes 370, 372, *supra*; *PROPERTY RESTATEMENT, App.*, Ch. A, ¶12 (1944). Option to renew lease: *Burns v. City of New York*, 213 N.Y. 516, 108 N.E. 77 (1915); *Stender v. Kerreos*, 156 Mich. 499, 121 N.W. 258 (1909), Part Two, note 375 *supra*; *Gould v. Harley*, 215 Mich. 234, 183 N.W. 705 (1921), Part Two, note 377 *supra*; Michigan cases cited in Part Two, note 373 *supra*; Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §396 (1928).

¹⁰⁷ Part Two, note 332 *supra*.

¹⁰⁸ Part Two, notes 336, 342, *supra*.

them to convey an absolute fee in possession.¹⁰⁹ Mortgages and land contracts do not suspend the absolute power of alienation so long as the parties thereto can join to convey an absolute fee in possession.¹¹⁰

It would seem that the absolute power of alienation is not suspended, within the meaning of Section 14, by a limitation of a present or future interest, otherwise alienable, to a person who, by reason of some personal incapacity, such as infancy or insanity, does not have normal power to convey land.¹¹¹ At common law, when property was conveyed to a public or charitable corporation with a restriction, express or implied, to use for the corporate purposes or some of them, the corporation was incapable of alienating the property.¹¹² A literal application of Sections 14 and 15¹¹³ might make void all such conveyances in mortmain. Yet direct conveyances and devises of land to public and charitable corporations for corporate purposes have always been valid in both New York and Michigan,¹¹⁴ probably because the power to receive and hold land for their corporate purposes conferred upon such corporations by statute was looked

¹⁰⁹ Part Two, notes 339, 346, 347, *supra*; Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§182, 212, 213, 392-394 (1928); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.9.

¹¹⁰ Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§214, 215 (1928).

¹¹¹ *Van Gallow v. Brandt*, 168 Mich. 642, 134 N.W. 987 (1912) (minor); Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§47, 49, 50 (1928); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §§25.7, 25.39 (1952).

¹¹² Part One, note 219 *supra*.

¹¹³ Part Three, notes 1, 76, *supra*.

¹¹⁴ *Bird v. Merkle*, 144 N.Y. 544, 39 N.E. 645 (1895); Michigan cases cited in Part Two, notes 396-400, *supra*; Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §510 (1928); *PROPERTY RESTATEMENT, App.*, Ch. B, ¶55 (1944). A direct conveyance or devise to a charitable corporation must be distinguished from a charitable trust, which received very different treatment under the statutes. Part Two, note 406 *supra*; *PROPERTY RESTATEMENT, App.*, Ch. B, ¶55 (1944).

upon as exempting interests limited to them from the operation of the suspension statutes. Michigan legislation of 1907 and later made it clear that such dispositions were not invalidated by the suspension statutes.¹¹⁵

Section 14 provided, "Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; - - -." ¹¹⁶ This made it clear that a future interest which violated the suspension statutes, like a future interest which violated the common-law Rule Against Perpetuities, was wholly void, not merely invalid as to the excess.¹¹⁷ The effect of such invalidity on the title to the property in which the void interest was limited and upon other limitations in the same conveyance or will was the same as the effect of an interest being invalid under the common-law Rule Against Perpetuities.¹¹⁸ This being so, the consequences of violation of the suspension statutes and those of violation of the common-law Rule have been treated together in Chapter 17.

B. POWERS

(1) Powers Which Cause Suspension

The Michigan law of powers over land was codified by Chapter 64 of the Revised Statutes of 1846,¹¹⁹ which

¹¹⁵ Part Two, notes 400, 421, 423, 427, 428, *supra*.

¹¹⁶ Part Three, notes 1, 76, *supra*.

¹¹⁷ 2 Simes, LAW OF FUTURE INTERESTS, §566 (1936).

¹¹⁸ PROPERTY RESTATEMENT, *App.*, Ch. A, ¶¶40, 70 (1944).

¹¹⁹ Rev. Stat. 1846, c. 64; Comp. Laws (1857) §§2658 to 2719; Comp. Laws (1871) §§4141 to 4202; Comp. Laws (1897) §§8856 to 8917; How. Stat., §§5590 to 5651; Comp. Laws (1915) §§11592 to 11653; Comp. Laws (1929) §§12995 to 13056; Mich. Stat. Ann., §§26.91 to 26.152; Comp. Laws (1948) §§556.1 to 556.62. The following sections are pertinent to the present discussion.

"§2. A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the

owner granting or reserving such power, might himself lawfully perform.

§4. Powers, as authorized in this chapter, are general or special, and beneficial or in trust.

§5. A power is general, when it authorizes the alienation in fee, by means of a conveyance, will or charge of the land embraced in the power, to any alienee whatever.

§6. A power is special,

1. When the person or class of persons, to whom the disposition of the lands under the power is to be made, are designated:

2. When the power authorizes the alienation, by means of a conveyance, will or charge, of a particular estate or interest less than a fee.

§7. A general or special power is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution.

§22. A general power is in trust when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds, or any portion of the proceeds or other benefits to arise from the alienation of the lands, according to the power.

§23. A special power is in trust,

1. When the disposition which it authorizes, is limited to be made to any particular person or class of persons, other than the grantee of such power:

2. When any person or class of persons, other than the grantee, is entitled to any benefit from the disposition or charge authorized by the power.

§24. Every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity for the benefit of the parties interested.

§25. A trust power does not cease to be imperative when the grantee has the right to select any, and exclude others of the persons designated as the objects of the trust.

§26. When a disposition under a power is directed to be made to, or among, or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion.

§27. But when the terms of the power import that the estate or fund is to be distributed between the persons so designated, in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons, in exclusion of the others.

§28. If the trustee of a power, with the right of selection, shall die leaving the power unexecuted, its execution shall be decreed in the court of chancery for the benefit equally of all the persons designated as objects of the trust.

§29. When a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution shall devolve on the court of chancery.

was adopted from the New York Revised Statutes of 1829¹²⁰ and is still in force. This codification differs from the common-law rules¹²¹ as to terminology¹²² and, to a lesser extent, as to substance. Whereas at common law the term "power in trust" is equivalent to "imperative power," the statutes extend the term "power in trust" to include all powers which are not beneficial solely to the donee and all powers under which the donee cannot appoint to himself or his estate. The most im-

§33. The grantor in any conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and every power so reserved, shall be subject to the provisions of this chapter, in the same manner as if granted to another.

§36. Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is reserved or granted in the instrument creating the power.

§47. When the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor they are to be performed, they may be wholly disregarded in the execution of the power.

§48. With the exceptions contained in the preceding sections, the intentions of the grantor of a power, as to the mode, time and conditions of its execution shall be observed, subject to the power of a court of chancery to supply a defective execution, in the cases hereinafter provided."

¹²⁰ Part II, c. 1, Tit. II, Art. Third.

¹²¹ That is, non-statutory law. Most of the law of powers is of equitable origin. 1 Simes, *LAW OF FUTURE INTERESTS*, §245 (1936).

¹²² 1 Simes, *LAW OF FUTURE INTERESTS*, §292 (1936); *PROPERTY RESTATEMENT*, §320, *Comment e.*, *Special Note* (1948 Supp.); 3 Walsh, *LAW OF REAL PROPERTY*, §321 (1947), quoting the notes of the New York revisers, which make it clear that the changes in terminology were deliberate. Whereas at common law the term "general power" includes any power unlimited as to objects (possible appointees), the statutes (Sec. 5) restrict that term to powers to alienate the entire fee. Whereas at common law the term "special power" is restricted to powers limited as to objects, the statutes (§6) extend that term to all powers to alienate less than a fee. Whereas at common law the term "power in trust" is equivalent to "imperative power," the statutes (§§22, 23) include some powers which are not imperative in their definition of powers in trust. The statutes refer to the holder of a power as the "grantee" (§62), whereas at common law the holder of a power of appointment is usually referred to as the "donee." For the common-law terminology, see 1 Simes, *LAW OF FUTURE INTERESTS*, §§246, 247 (1936); *PROPERTY RESTATEMENT*, §§319, 320 (1940).

portant difference in substance is that every power which the statutes denominate a "power in trust"¹²³ is imperative unless its execution is made expressly to depend on the will of the donee.¹²⁴ An imperative power is one which the donee has a duty, enforcible in equity, to execute. At common law the rule is less rigid; although a power limited as to objects is presumptively imperative if there is no gift in default of appointment, express language is not required to rebut the presumption.¹²⁵

There is very little Michigan case authority as to the application of the suspension of the absolute power of alienation statutes to powers. The New York cases cannot be relied upon because of two important differences between the New York and Michigan statutes. First, the New York suspension statutes apply to both land and personalty, whereas the Michigan suspension statutes were restricted to land.¹²⁶ Second, the New York suspension statutes were interpreted to restrict suspension of vesting as well as suspension of the absolute power of alienation, whereas the Michigan statutes were interpreted as restricting only the latter.¹²⁷ Because the New York statutes, like the common-law Rule Against Perpetuities, restrict suspension of vesting, they prohibit powers which operate in such manner as to suspend vesting for longer than the statutory permissible period. Hence all powers which would violate the common-law

¹²³ §§22, 23, note 119 *supra*.

¹²⁴ §24, note 119 *supra*. In *Waterman v. New York Life Insurance & Trust Co.*, 237 N.Y. 293, 142 N.E. 668 (1923), it was held that a power to appoint "to such one of my nephews of my own blood as she may by her will direct" was not imperative.

¹²⁵ PROPERTY RESTATEMENT, §367 (1940); Simes, "Powers in Trust and the Termination of Powers by the Donee," 37 YALE L.J. 63 (1927); Callahan and Leach, "Powers of Appointment," 5 AMERICAN LAW OF PROPERTY, §23.63 (1952).

¹²⁶ Part Three, notes 7, 8, *supra*.

¹²⁷ Part Three, notes 12, 86, 90-94, 96-99, *supra*.

Rule also violate the New York statutes.¹²⁸ But all such powers did not violate the Michigan statutes. In Michigan the sole guide is Section 14 of Chapter 62 of the Revised Statutes of 1846, which provided that the absolute power of alienation is suspended, "when there are no persons in being, by whom an absolute fee in possession can be conveyed."¹²⁹ If a power operated to suspend the absolute power of alienation, as so defined, for longer than the statutory permissible period, it was void. It would seem that a power itself, as distinguished from interests appointed under the power and interests limited in default of its exercise, suspends the absolute power of alienation in the following situations:

Class (a) *Donee not in being or not ascertainable*. If the power is limited to a person or corporation not in being, to a class the membership of which may possibly include a person or corporation not presently in being, or to a donee or donees so described that neither the donees nor the group from among whom the donees are to be selected are presently ascertainable, and the power cannot be revoked, released, or overridden by ascertainable persons in being, the power suspends the absolute power of alienation.¹³⁰ If Andrew Baker devised land to

¹²⁸ The application of the common-law Rule Against Perpetuities to powers of appointment is covered in Chapter 13, Sec. B, *supra*. The application of the New York suspension statutes to powers is discussed in detail in Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§306-363 (1928), and more briefly in *PROPERTY RESTATEMENT, App.*, Ch. A (1944); 3 Walsh, *LAW OF REAL PROPERTY*, §349 (1947), and Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.13 (1952).

¹²⁹ Part Three, note 1 *supra*.

¹³⁰ *Battelle v. Parks*, 2 Mich. 531 (1853), involved a will which empowered the "executors or administrators" to sell land for the benefit of named legatees, but named no executors. It was held that the power was valid and exercisable by administrators *cum testamento annexo*, but the opinion suggests that such a power given to administrators for their own benefit would violate the suspension statutes because it would not be certain that the administrators would be ascer-

James Thorpe and his heirs, subject to a power in the first son of John Stiles (who had no son) to appoint the fee by deed or will to any person or persons, the power would suspend the absolute power of alienation until John had a son or died. Similarly, if Andrew Baker devised land to James Thorpe and his heirs, subject to a power in the children of John Stiles (who had five children) who survive him to appoint the fee by deed or will to any person or persons, the power would suspend the absolute power of alienation until the class of donees was closed by the death of John. Likewise, if Andrew Baker devised land to James Thorpe and his heirs, subject to a power in the person who should be Governor of Michigan in the year 1984 to appoint the fee by deed or will to any person or persons, the power would suspend the absolute power of alienation until 1984. The examples given involve powers beneficial solely to the donee. Class (a) also includes what the statutes term powers in trust, but the beneficiaries of a power in trust would be able to override it unless it also falls into Class (b) or (c) below.

Class (b) *Beneficiaries not in being or not ascertainable*. If the power is in trust, as that term is defined by the statutes, is not presently exercisable for the sole benefit of ascertainable persons in being, and the beneficiaries are a person or corporation not in being, a class the membership of which may possibly include a person or corporation not presently in being, or persons so described that neither they nor the group from among whom they

tainable within two lives. Both the decision and the dictum are consistent with the rule stated in the text. The actual power involved in the case could be overridden by the named legatees, who were ascertainable persons in being, so it did not fall into Class (a). If, however, the administrators had been the beneficiaries of the power as well as its donees, the power would have fallen into Classes (a) and (b).

are to be selected are presently ascertainable, and the power cannot be revoked, released or overridden by ascertainable persons in being, the power suspends the absolute power of alienation.¹³¹ If Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles (who had no son) to appoint the fee to his first son, the power would suspend the absolute power of alienation until John had a son. Similarly, if Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles (who has five children) to appoint the fee by will to those of his children who survive him, the power would suspend the absolute power of alienation until the class of objects was closed by the death of John. Likewise, if Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles to appoint the fee to some member of the Michigan Legislature of 1983, the power would suspend the absolute power of alienation until 1983.

The three examples just given, as falling in Class (b), are of imperative powers of appointment limited as to object. Class (b) also includes imperative powers to sell, lease, charge, or encumber land when any person or class of persons other than the donee "is designated as entitled to the proceeds, or any portion of the proceeds or other

¹³¹ *Trufant v. Nunneley*, 106 Mich. 554, 64 N.W. 469 (1895) (imperative power to purchase land and convey a remainder therein to a class of persons which could not be ascertained for three lives and might include persons who came into being after two lives). In *Moss v. Axford*, 246 Mich. 288, 224, N.W. 425 (1929), the residue of an estate was devised to the executor, "with the instructions to pay the same to the person who has given me the best care in my declining years and who in his opinion is the most worthy of my said property." It was held that the power did not suspend the absolute power of alienation. It did suspend vesting but the group from among whom the beneficiary was to be selected consisted of ascertainable persons in being who could join with the executor to convey an absolute fee in possession. See also the preceding note.

benefits to arise from the alienation of the lands" or "from the disposition or charge authorized by the power."¹³² If Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles (who had no son) to mortgage for \$5,000 to pay for the education of his first son, the power would suspend the absolute power of alienation. Similarly, if Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles (who had no son) to sell the fee when his first son reached the age of eighteen and use the proceeds of such sale to pay for the education of such son, the power would suspend the absolute power of alienation. Because the Michigan suspension statutes were limited to land, Class (b) has an exception: an imperative power to sell the entire fee for money or exchange it for personalty, presently exercisable, would not suspend the absolute power of alienation even though the beneficiaries of the proceeds were not in being or not ascertainable. Such a power would work an immediate equitable conversion of the land into personalty, so the suspension statutes would not apply.¹³³ If Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles (who had no son) to sell the fee at once and hold the proceeds in trust for James and his heirs until John's first son reached the age of eighteen, then to use the proceeds to pay for the education of such son, the power would not suspend the absolute power of alienation for a moment, even though John, with the consent of James, chose to delay effectuating the sale.

¹³² Rev. Stat. 1846, c. 64, §§22, 23, Part Three, note 119 *supra*. That is, if it is an imperative "power in trust" as this term is defined by the statutes.

¹³³ Part Three, notes 9 *supra*, 197 *infra*.

Class (c) *Power to create a trust*. If the power is in trust, as that term is defined by the statutes, and calls for the creation or prolongation of a trust which would itself suspend the absolute power of alienation, and the power cannot be revoked, released, or overridden by ascertainable persons in being, the power suspends the absolute power of alienation.¹³⁴ As will be made clear in Section C below, a trust for receipt of the rents and profits of land suspends the absolute power of alienation because, by statute, the interests of the trustee and the *cestui que trust* are inalienable. Hence an imperative power to create such a trust also suspends the absolute power of alienation. If Andrew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles to create a trust of the land for application of the rents and profits to the support of Lucy Stiles, present wife of John, for the life of Lucy, the power would suspend the absolute power of alienation for the life of Lucy.

It would seem that powers not included in one or more of these three classes did not suspend the absolute power of alienation under Michigan law. A power was not within any of these classes if it could be revoked, released, or overridden by ascertainable persons in being because, in those cases, there were "persons in being, by whom an absolute fee in possession" could be conveyed, despite the power, within the meaning of Section 14 of Chapter 62.¹³⁵ The statutes expressly provided that "Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is reserved or

¹³⁴ Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §342 (1928). See: *Garvey v. McDevitt*, 72 N.Y. 556 (1878).

¹³⁵ Part Three, note 1 *supra*.

granted in the instrument creating the power.”¹³⁶ The beneficiaries of a power may override it, that is, convey free of it, if they are all in being and ascertained and their interests are not inalienable because subject to a trust for receipt of the rents and profits of land.¹³⁷ If Andrew Baker devised Blackacre to James Thorpe and his heirs, subject to an imperative power in John Stiles to appoint the fee to any one of his brothers, Thomas, Richard, and Henry, when and if James Thorpe or his heirs should inherit Whiteacre, James, John, Thomas, Richard, and Henry are persons in being who could presently convey an absolute fee in possession. Express provisions of the instrument creating the power could enable less than all the beneficiaries to override it. Thus, in the second example given in Class (b) above, if An-

¹³⁶ Rev. Stat. 1846, c. 64, §36, Part Three, note 119 *supra*. Accord, at common law: PROPERTY RESTATEMENT, §337 (1) (1940); Callahan and Leach, “Powers of Appointment,” 5 AMERICAN LAW OF PROPERTY, §23.31 (1952).

¹³⁷ *Battelle v. Parks*, 2 Mich. 531 (1853), Part Three, note 130 *supra*; *Fitzgerald v. City of Big Rapids*, 123 Mich. 281, 82 N.W. 56 (1900); Part Three, note 93 *supra*; *Moss v. Axford*, 246 Mich. 288, 224 N.W. 425 (1929), Part Three, note 131 *supra*; *Hetzel v. Barber*, 69 N.Y. 1 (1877); *Trask v. Sturges*, 170 N.Y. 482, 63 N.E. 534 (1902); PROPERTY RESTATEMENT, §338 (1940); Callahan and Leach, “Powers of Appointment,” 5 AMERICAN LAW OF PROPERTY, §23.32 (1952); *Whiteside*, “Statutory Rules: Perpetuities and Accumulations,” 6 AMERICAN LAW OF PROPERTY, §25.13n (1952). See: *Bennett v. Chapin*, 77 Mich. 526 at 538, 43 N.W. 893 (1889). Cf. *State v. Holmes*, 115 Mich. 456, 73 N.W. 548 (1898), Part Three, note 88 *supra*. In *Matter of Butterfield*, 133 N.Y. 473, *sub nom.* In re Christie, 31 N.E. 515 (1892), where a testator devised land to his children in fee, subject to an imperative power in the executrix, not to be exercised until all of his children, five of whom were minors, should reach their majority, to sell the land for payment of debts and legacies. It was held that, because of the New York equivalent of Rev. stat. 1846, c. 64, §48, Part Three, note 119 *supra*, the power could not be overridden by the beneficiaries (i.e., the creditors and legatees, who were ascertained persons in being) because it was on the express condition that it should not be exercised until a future time. Consequently, the power suspended the absolute power of alienation for longer than the permissible period. It would seem that Sec. 48 does not really relate to the problem of overriding and that the decision is unsound.

drew Baker devised land to James Thorpe and his heirs, subject to an imperative power in John Stiles (who has five children) to appoint the fee by will to those of his children who survive him, the power would not suspend the absolute power of alienation if the will further provided, "but such power may be overridden during the life of John by his children in being at the time of such over-riding."

Class (a) comprises powers limited to a donee who is not in being or not ascertainable. Such a power cannot be released by the donee. Classes (b) and (c) comprise powers in trust, which term under the statutes includes all powers which are not beneficial solely to the donee and all powers under which the donee cannot appoint to himself or his estate. As has been seen, under the statutes, a power in trust is imperative unless its execution is made expressly to depend on the will of the donee. At common law an imperative power cannot be released by the donee,¹³⁸ and there is no doubt that this was also the rule under Chapter 64 of the Revised Statutes of 1846. There is a conflict of authority at common law as to whether and under what circumstances a power limited as to objects which is not imperative may be released by the donee,¹³⁹ and there is grave doubt on

¹³⁸ 1 Simes, *LAW OF FUTURE INTERESTS*, §281 (1936); *PROPERTY RESTATEMENT*, §335 (1940) and 1948 Supp.; Simes, "Powers in Trust and the Termination of Powers by the Donee," 37 *YALE L.J.* 211 at 216 (1927).

¹³⁹ 1 Simes, *LAW OF FUTURE INTERESTS*, §§283, 284 (1936); *PROPERTY RESTATEMENT*, §335 (1940), as changed by 1948 Supp.; 3 Walsh, *LAW OF REAL PROPERTY*, §334 (1947); Callahan and Leach, "Powers of Appointment," 5 *AMERICAN LAW OF PROPERTY*, §§23.27, 23.28 (1952); Annotation, 76 *A.L.R.* 1430 (1932); Simes, "Powers in Trust and the Release of Powers by the Donee," 37 *YALE L.J.* 211 (1927); Ball, "Release of Powers of Appointment for Federal Estate Tax Purposes," 4 *ARK. L. REV.* 66 (1949-50). Prior to 1881 the English rule seems to have been that such powers were releasable if the donee had a possessory estate in the land in addition to the power but not otherwise.

the question of whether the donee of a power which is in trust, within the statutory meaning of that term, but not imperative, could release the power under the New York and Michigan statutes.¹⁴⁰ Act 296 of the Public Acts of 1945¹⁴¹ provides that the donee of a power, including a power in trust, may release the power. It follows that powers in trust created between May 25, 1945, the effective date of Act 296, and September 23, 1949, the effective date of the repeal of the suspension statutes, were releasable if the donee was in being and ascertainable. This means that no power created after May 24, 1945, fell into Classes (b) or (c). Act 296 pur-

Stat. 44 & 45 Vict., c. 41, §52, (1881), re-enacted, 15 Geo. V, c. 20, §155 (1925) permits release in either case. Professor Simes thinks that all non-imperative powers are releasable. The Restatement originally took the position that powers limited as to objects were releasable only if the donor manifested an intention to that effect or if the power is presently exercisable (i.e. not testamentary or subject to a condition precedent) and the takers in default are persons to whom an effective appointment could be made. It now takes the view that such powers can be released unless the donor has manifested a contrary intent. It takes no position as to the effect of such a manifestation where the power is not imperative.

¹⁴⁰ Chase National Bank v. Chicago Title and Trust Co., 155 Misc. 61, 279 N.Y. Supp. 327 (1935), *aff'd.*, 246 App. Div. 201, 284 N.Y. Supp. 472 (1935), *aff'd.*, 271 N.Y. 602, 659, 3 N.E. (2d) 205, 475 (1936). The Appellate Division held that such a power could not be released. The Court of Appeals refused to pass on the question because the donee of the power subsequently died without attempting to exercise it. In *Merrill v. Lynch*, 13 N.Y. Supp. (2d) 514 at 532-533 (Sup. Ct. Spec. Term, 1939) it was suggested that the view of the Appellate Division was unsound. The fact that Rev. Stat. 1846, c. 64, §17, Part Three, note 119 *supra*, expressly authorizes a tenant for life with power to make leases for years to release the power to any person entitled to an expectant estate in the land, indicates by virtue of the maxim *expressio unius exclusio alterius*, that other powers in trust are not releasable. Sec. 15 classes such a power in a tenant for life as beneficial, but it is difficult to see why it does not fall under the definition of a power in trust made by Sec. 23, Part Three, note 119 *supra*.

¹⁴¹ Mich. Stat. Ann., §§26.154(1) to 26.154(6); Comp. Laws (1948) §§556.101 to 556.106. Similar statutes were enacted in a number of other states at about the same time. PROPERTY RESTATEMENT, 1948 Supp., §335, *Comment e*; Simes, HANDBOOK OF FUTURE INTERESTS, §74 (1951).

ports to validate releases of powers executed before its effective date,¹⁴² but it would seem that retroactive application of the act would be unconstitutional insofar as it disturbed vested rights of property.

(2) Interests Created By Execution of Powers

An interest in land created by the donee of a power by execution of the power suspends the absolute power of alienation, within the meaning of Section 14 of Chapter 62 of the Revised Statutes of 1846,¹⁴³ in the following situations:

(a) If the interest so created is an indestructible future interest of a type which, under the rules discussed in Section A, above, suspends the absolute power of alienation.

(b) If the interest so created is a power of a type which, under the rules discussed in Subsection B (1), above, suspends the absolute power of alienation.

(c) If the interest so created is a trust of a type which, under the rules discussed in Section C, below, suspends the absolute power of alienation.

In other words, the types of interests created by execution of a power which suspend the absolute power of alienation are exactly the same as the types of interests created by direct conveyance or devise which suspend the absolute power of alienation. The only difference is in the time from which the permissible period of suspension is computed. Whereas, in the case of an interest directly conveyed or devised, the suspension ordinarily commences when the deed or will creating it

¹⁴² §4, Mich. Stat. Ann., §26.154 (4); Comp. Laws (1948) §556.104.

¹⁴³ Part Three, note 1 *supra*.

takes effect,¹⁴⁴ in the case of an interest created by execution of a power the statutes provide,

"Sec. 55. The period during which the absolute right of alienation may be suspended by any instrument in execution of a power, shall be computed from the time of the creation of the power, and not from the date of such instrument.

"Sec. 56. No estate or interest can be given or limited to any person, by an instrument in execution of a power, which such person would not have been capable of taking, under the instrument by which the power was granted." ¹⁴⁵

These statutory provisions were taken from the New York Revised Statutes of 1829.¹⁴⁶ The New York Court of Appeals has indicated that these two sections are modified by other sections of the statutes which, as in force in Michigan, provide:

"Sec. 9. When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate, for life or years, such estate shall be changed into a fee, absolute in respect to the rights

¹⁴⁴ Rev. Stat. 1846, c. 62, §§15, 41, Part Three, note 1 *supra*, provided, "Sec. 15. The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being *at the creation of the estate*, . . . Sec. 41. The delivery of the grant, where an expectant estate is created by grant; and where it is created by devise, the death of the testator, shall be deemed the *time of the creation of the estate*." [Emphasis supplied.] It should be borne in mind, however, that an interest does not suspend the absolute power of alienation while it is destructible by virtue of the fact that there are ascertainable persons in being "by whom an absolute fee in possession can be conveyed." Rev. Stat. 1846, c. 62, §14, Part Three, note 1 *supra*. See Subsection (3), *infra*. Cf. Chapter 10, Section A, *supra*.

¹⁴⁵ Rev. Stat. 1846, c. 64, §§55, 56; Comp. Laws (1857) §§2712, 2713; Comp. Laws (1871) §§4195, 4196; Comp. Laws (1897) §§8910, 8911; How. Stat., §§5644, 5645; Comp. Laws (1915) §§11646, 11647; Comp. Laws (1929) §§13049, 13050; Mich. Stat. Ann., §§26.145, 26.146; Comp. Laws (1948) §§556.55, 556.56. These sections are still in force. As to their effectiveness, since the repeal of the suspension statutes, see Chapter 13, Section C, *supra*.

¹⁴⁶ Part II, c. 1, Art. Third, §§128, 129. See Part Two, note 303 *supra*.

of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts.

"Sec. 10. When a like power of disposition shall be given to any person to whom no particular estate is limited, such person shall also take a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors and purchasers.

"Sec. 11. In all cases where such power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee shall be entitled to an absolute fee.

"Sec. 12. When a general and beneficial power to devise the inheritance, shall be given to a tenant for life or for years, such tenant shall be deemed to possess an absolute power of disposition, within the meaning, and subject to the provisions of the three last preceding sections.

"Sec. 13. Every power of disposition shall be deemed absolute, by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit." ¹⁴⁷

¹⁴⁷ Rev. Stat. 1846, c. 64, §§9 to 13; Comp. Laws (1857) §§2666 to 2670; Comp. Laws (1871) §§4149 to 4153; Comp. Laws (1897) §§8864 to 8868; How. Stat., §§5598 to 5602; Comp. Laws (1915) §§11600-11604; Comp. Laws (1929) §§13003 to 13007; Mich. Stat. Ann., §§26.99-26.103; Comp. Laws (1948) §§556.9-556.13. N.Y. Rev. Stat. 1829, Part II, Art. Third, §§81-85 were identical, except as to section numbers. N.Y. Real Property Law, §§149 to 153, as presently in force, are virtually identical. These sections operated to eliminate the strange fiction of powers appendant, under which one person might have both the whole fee and a power to appoint the fee which would enable him to defeat dower and creditors. See: Simes, "The Devolution of Title to Appointed Property," 22 ILL. L. REV. 480 at 493-497 (1928).

The following section provides: "Sec. 14. When the grantor in any conveyance shall reserve to himself, for his own benefit an absolute power of revocation, such grantor shall still be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned."

As will be pointed out in the following subsection, the commencement of the period of the suspension statutes may be deferred, as to interests created by the exercise of a power as well as other interests, by the existence of such an absolute power of revocation or by other

In the view of the New York Court, if the donee of a power has an absolute power of disposition of the entire fee within the meaning of Sections 9-13, Sections 55 and 56 have no application, and the validity of interests created by him in execution of the power is determined as if he were in fact an absolute owner disposing of his own property. If the donee does not have an absolute power of disposition of the entire fee within the meaning of Sections 9-13, Sections 55 and 56 do apply, and the validity of interests created by him in execution of the power is judged from the time of the creation of the power.¹⁴⁸ Thus if the donee's power of disposition is limited to a future estate, it does not come within Sections 9-13, so Sections 55 and 56 apply. If Andrew Baker devises land to James Thorpe upon trust to pay the rents and profits to John Stiles for life, remainder as John Stiles may by deed or will appoint, John cannot dispose of the entire fee because, under New York and Michigan law, his equitable life interest as beneficiary of the trust is inalienable.¹⁴⁹ Hence, even though his power to dispose of the remainder is unlimited and presently exercisable by deed, the validity of any appointment which he makes will be judged, under the New York view, from the death of Andrew.¹⁵⁰

provisions which make the interest destructible because there are ascertained persons in being "by whom an absolute fee in possession can be conveyed." Rev. Stat. 1846, c. 62, §14, Part Three, notes 1, 144, *supra*.

¹⁴⁸ *Farmers' Loan & Trust Co. v. Kip*, 192 N.Y. 266, 85 N.E. 59 (1908); Bettner, "The Rule Against Perpetuities as Applied to Powers of Appointment," 27 VA. L. REV. 149 at 167-171 (1940). Professor Walsh thought, however, that even an absolute power of disposition was governed by §§55 and 56; that the dictum to the contrary in the *Kip* case was unsound. 3 LAW OF REAL PROPERTY, §349 (1947).

¹⁴⁹ Part One, notes 580, 583, 621, 625, *supra*. See: *Hunt v. Hunt*, 124 Mich. 502, 83 N.W. 371 (1900); *In re Peck Estates*, 320 Mich. 692, 32 N.W. (2d) 14 (1948); *Cutting v. Cutting*, 86 N.Y. 522 (1881).

¹⁵⁰ *Farmers' Loan & Trust Co. v. Kip*, 192 N.Y. 266, 85 N.E. 59 (1908).

As has been seen, when a power of appointment is restricted as to objects or exercisable only by will, the period of the common-law Rule Against Perpetuities is computed, as to interests created by exercise of the power, from the time of the creation of the power, rather than from that of its exercise; but facts which occur between the creation and exercise of the power may be considered in determining whether such interests are certain not to vest beyond the permissible period.¹⁵¹ Under the New York and Michigan statutes, when a power of appointment is not an absolute power of disposition, the period of permissible suspension of the absolute power of alienation is computed, as to interests created by exercise of the power, under Section 55, from the time of the creation of the power, rather than from that of its exercise, but it has not been settled in either state whether facts which occur between the creation and exercise of the power may be considered in determining whether such interests are certain not to suspend the absolute power of alienation beyond the permissible period.¹⁵²

(3) Powers Which Prevent Suspension: Destructibility

As has been seen, under the common-law Rule Against Perpetuities, if a future interest will be destructible at all times until it vests, it is not subject to the Rule, and if a future interest is so limited as to be destructible for a time and then indestructible for a time before it vests,

¹⁵¹ Part Two, notes 318, 322, 324, *supra*.

¹⁵² PROPERTY RESTATEMENT, *App.*, Ch. A, ¶30 (1944) (taking the position that such facts may be considered); Whiteside, "Perpetuities and Accumulations: Statutory Rules," 6 AMERICAN LAW OF PROPERTY, §25.13 (1952) (expressing the view that they may not be considered). Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §§360-362 (1928), appears to favor the latter view.

the Rule applies, but the period of the Rule does not commence until the interest becomes indestructible.¹⁵³ A future interest is destructible for purposes of the common-law Rule Against Perpetuities only while some ascertained living person has unlimited and unconditional power to destroy it for his own exclusive benefit.¹⁵⁴ Where estates tail have been abolished, such destructibility under the common-law Rule ordinarily exists only because of a presently exercisable power of appointment or of revocation, by the exercise of which the donee could immediately vest the future interest in himself.

Under the statutes restricting suspension of the absolute power of alienation there is an analogous doctrine of destructibility. A future interest, power, or trust does not suspend the absolute power of alienation while there are ascertained persons in being who have unlimited and unconditional power to convey an absolute fee in possession.¹⁵⁵ As in the case of the common-law Rule, such destructibility ordinarily exists because of a power of appointment or of revocation, but the doctrine of destructibility under the statutes differs from the doctrine under the common-law Rule in seven important respects:

(a) Whereas, under the common-law Rule, the power of destruction must reside in the holder or holders of a

¹⁵³ Part Two, notes 69, 70, *supra*.

¹⁵⁴ Part Two, note 74 *supra*. As pointed out in the text at Part Two, notes 75-81, *supra*, a future interest is not destructible for purposes of the common-law Rule merely because its owner is ascertained, in being, and capable of uniting with the owners of other interests to convey an absolute fee; a power of appointment limited as to objects, exercisable only by will, or subject to a condition precedent, is not sufficient to make an interest subject to the power destructible; and a power of sale is not sufficient if the proceeds of the sale would be subject to the future interest.

¹⁵⁵ Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §56 (1928); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶¶14, 20 (1944); White-side, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.15 (1952).

single estate, interest, or power,¹⁵⁶ under the statutes it is sufficient if the holders of various estates, interests, and powers can combine to convey an absolute fee in possession.¹⁵⁷ If Andrew Baker conveys land to John Stiles (who has no son) and his heirs until some son of John reaches the age of thirty years and then to such son and his heirs, subject to a power in John and his heirs to appoint an absolute fee to any person or persons with the consent of the grantor, his heirs or assigns, the limitation to the son of John is not destructible under the common-law Rule Against Perpetuities and is void under that Rule. The interest of the son of John would, however, be destructible and valid under the Michigan suspension statutes, because there would at all times be persons capable of conveying an absolute fee in possession.

(b) Whereas, under the common-law Rule, the power of destruction must enable its holder to destroy the future interest for his own exclusive benefit,¹⁵⁸ under the statutes it is sufficient that the power be exercisable for the benefit of others,¹⁵⁹ so long as its exercise does not subject the holder to any condition or penalty.¹⁶⁰ If

¹⁵⁶ Part Two, note 74 *supra*. PROPERTY RESTATEMENT, §373, *Comment d.* (1944), takes the position that destructibility does not exist if the power must be jointly exercised by two or more persons or is exercisable by the donee only with the concurrence of one or more other persons.

¹⁵⁷ *Williams v. Montgomery*, 148 N.Y. 519, 43 N.E. 57 (1896); Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §81 (1928); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.15 (1952).

¹⁵⁸ Part Two, note 74 *supra*. PROPERTY RESTATEMENT, §373, *Comment d.* (1944).

¹⁵⁹ See *Matter of Wilcox*, 194 N.Y. 288 at 305, 306, 87 N.E. 497 (1909); Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §65 (1928); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶20 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.15 (1952).

¹⁶⁰ Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §71 (1928). In *Underwood v. Curtis*, 127 N.Y. 523, 28 N.E. 585 (1891), a

Andrew Baker conveys land to James Thorpe and his heirs upon trust to apply the rents and profits to the support of John Stiles, his sons, and grandsons, during their lives, and upon the death of the last grandson of John to convey the land to the great-grandsons of John, subject to an absolute and unconditional power in the trustee and his successors to terminate the trust at any time by reconveying the land to the settlor, his heirs or assigns, the remote future interests are not destructible under the common-law Rule Against Perpetuities and are void under that Rule. They would, however, be destructible and valid under the Michigan suspension statutes, because there would at all times be persons capable of conveying an absolute fee in possession.¹⁶¹

(c) Whereas, under the common-law Rule, a power to destroy a future interest exercisable only by will is not sufficient,¹⁶² under Section 12 of Chapter 64 of the Revised Statutes of 1846¹⁶³ a tenant for life or years with a general and beneficial power to devise the inheritance has an absolute power of disposition, which is sufficient.¹⁶⁴

(d) Whereas, under the common-law Rule, the mere fact that the holder of the future interest in question is in being, ascertained, and able to convey his interest, does not make it destructible, even though he can unite

will created a trust which suspended the absolute power of alienation for longer than the permissible term, subject to an unrestricted power in the *cestuis que trustent* to sell the land and distribute the proceeds to others. It was held that the penalty of loss of the property imposed upon the donees in the event of exercise of the power prevented the power from making the trust destructible.

¹⁶¹ *Schreyer v. Schreyer*, 101 App. Div. 456, 91 N.Y. Supp. 1065 (1905), *aff'd.*, 182 N.Y. 555, 75 N.E. 1134 (1905); Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §75 (1928); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.15 (1952).

¹⁶² Part Two, note 75 *supra*.

¹⁶³ Part Three, note 147 *supra*.

¹⁶⁴ See Part Two, note 321 *supra*.

with others to convey an absolute fee in possession,¹⁶⁵ under the Michigan statutes no interest suspended the absolute power of alienation if its owner was in being, ascertained, and able to unite with the holders of other estates, interests, and powers to convey an absolute fee in possession.¹⁶⁶ If Andrew Baker devises land to James Thorpe and his heirs so long as the Penobscot Building stands and then to John Stiles and his heirs, the interest of John Stiles, although alienable, is not destructible under the common-law Rule Against Perpetuities and is void. As James and John have unconditional power to convey an absolute fee in possession at any time, the interest of John would not offend the Michigan suspension statutes.

(e) Whereas, under the common-law Rule, it is sufficient if the offending future interest itself is destructible,¹⁶⁷ under the statutes destructibility does not exist unless ascertained persons in being have power to convey the entire fee.¹⁶⁸ If Andrew Baker devises land to James Thorpe and his heirs for the life of John Stiles, (who has no son), upon trust to apply the rents and profits to the use of John, remainder to the first son of John who reaches the age of thirty, subject to a power in John to appoint the remainder by deed or will to any person or persons, the limitation to the son of John is destructible during the life of John under the common-law Rule Against Perpetuities and so is valid because it must vest within lives in being at the death of John. Under the statutes, however, because the life interest of John is inalienable, there are no persons in being

¹⁶⁵ Part Two, note 78 *supra*.

¹⁶⁶ Part Three, notes 90-94, 96-99, *supra*. PROPERTY RESTATEMENT, App., Ch. B, ¶53 (1944); But see Part Three note 160 *supra*.

¹⁶⁷ Part Two, note 67 *supra*.

¹⁶⁸ See: Cutting v. Cutting, 86 N.Y. 522 (1881).

during the life of John who can convey an absolute fee in possession.¹⁶⁹

(f) Whereas, under the common-law Rule, if a future interest is so limited as to be destructible for a time and then indestructible for a time before it vests, the period of the Rule does not commence until the interest becomes indestructible and lives in being at that time may be used as measuring lives although they were not in being when the instrument creating the interest became effective,¹⁷⁰ this is not the case under the statutes. An interest does not suspend the absolute power of alienation while ascertained persons in being have unlimited power to convey an absolute fee in possession, but if an interest is so limited as to be destructible in this sense for a time and then indestructible for a time, during which it will suspend the absolute power of alienation, the two lives which measure the permissible period of suspension must be those of persons who were in being when the instrument creating the interest became effective.¹⁷¹ If John Stiles (who has no son) conveys land to James Thorpe and his heirs upon trust to apply the rents and profits to the use of John for life, then to apply them to the use of the first son of John for life and, at his death, to convey the land to the eldest son of such first son, subject to an unconditional power in John to revoke by deed or will, the interests of the son and grandson are destructible under both the common-law Rule Against Perpetuities and the statutes during the life of John. The first son of John must necessarily be in being at John's death, and the grandson must neces-

¹⁶⁹ See Part Three, note 149 *supra*.

¹⁷⁰ Part Two, note 70 *supra*.

¹⁷¹ Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§63, 95 (1928). *Contra*: *PROPERTY RESTATEMENT, App.*, Ch. A, ¶14, *Ill.* 8 (1944).

sarily come into being during the son's life, so their interests do not violate the common-law Rule. But both interests would violate the suspension statutes because they would suspend the absolute power of alienation during the life of John's first son, a life not in being at the time of the conveyance. On the other hand, if John Stiles, having a son Henry and a grandson Peter, conveys land to James Thorpe and his heirs upon trust to apply the rents and profits to the use of John for life, then to the use of Henry for life, then to the use of Peter for life and, on the death of Peter, to convey the land to the first son of Peter, subject to an unconditional power in John to revoke by deed or will, the fact that the interests were destructible during the life of John would mean that the absolute power of alienation was suspended for only two, instead of three, lives, those of Henry and Peter, which were in being at the time of the conveyance. Hence none of the limitations would violate the statutes.¹⁷²

(g) Whereas, under the common-law Rule, a power to sell land or exchange it for other property is not sufficient if the proceeds of the sale or property received in exchange are subject to the future interest,¹⁷³ under the Michigan statutes, a power to convert land into other property could, in some situations, prevent a future interest, power, or trust from suspending the absolute power of alienation.¹⁷⁴ This is because the common-law Rule Against Perpetuities applies to all forms of property, whereas the Michigan statutes applied only to land.

¹⁷² *Equitable Trust Co. v. Pratt*, 117 Misc. 708, 193 N.Y. Supp. 152 (1922), *aff'd.*, 206 App. Div. 689, 199 N.Y. Supp. 921 (1923).

¹⁷³ Part Two, notes 79, 81, *supra*.

¹⁷⁴ Part One, note 639, Part Three, note 9 *supra*; PROPERTY RESTATEMENT, *App.*, Ch. B, §51 (1944); This point is covered in detail in the paragraphs which follow.

Because the common-law Rule Against Perpetuities applies only to unvested future interests and has no application to present and other vested interests, whether or not they are subject to a trust, the examples of destructibility given in the preceding paragraphs (a) through (g) have been designed to illustrate, by contrasting the common law and statutory rules, the existence and effect of destructibility in the case of future interests which, in the absence of destructibility, would violate both the common-law Rule Against Perpetuities and the suspension statutes. Because, under the New York and Michigan statutes, the interests of the trustee and *cestuis que trustent* of a trust for receipt of the rents and profits of land are inalienable,¹⁷⁵ such a trust suspends the absolute power of alienation even though all interests involved are present or vested.¹⁷⁶ Most of the decisions as to the existence and effect of destructibility under the statutes relate to suspension of the absolute power of alienation by trusts, and hence the details of the doctrine of destructibility under the statutes must be developed by consideration of those decisions. It should be borne in mind, however, that the principles developed by the cases apply equally to suspension of the absolute power of alienation occasioned by future interests limited to unborn or unascertained persons and by powers.

Under the New York decisions and what Michigan cases there are, for destructibility to exist, not only must ascertained persons in being have power to convey an absolute fee in possession, but the power itself must be absolute in the sense that its exercise is not subject to any condition precedent and does not entail any penalty

¹⁷⁵ Part One, notes 580, 583, 602, 621, *supra*.

¹⁷⁶ Part One, note 593 *supra*; Section C, *infra*.

or loss to the persons who exercise it.¹⁷⁷ Thus a trustee's power to terminate the trust by selling the land and distributing the proceeds to ascertained persons in being is not sufficient if sale is not permitted until a certain price can be obtained¹⁷⁸ or until the *cestuis que trustent* demonstrate capacity to handle the proceeds wisely.¹⁷⁹ Neither is it sufficient if its exercise is conditional upon the consent of the *cestuis que trustent* and the proceeds

¹⁷⁷ Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §64 (1928); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.15 (1952).

¹⁷⁸ *Stewart v. Woolley*, 121 App. Div. 531, 106 N.Y. Supp. 99 (1907); Chaplin, *id.*, §69; Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.15 (1952). See: *Spitzer v. Spitzer*, 38 App. Div. 436, 56 N.Y. Supp. 470 (1899); *Bennett v. Chapin*, 77 Mich. 526, 43 N.W. 893 (1889). In *Farrand v. Petit*, 84 Mich. 671, 48 N.W. 156 (1891), a power to plat and sell enough to pay taxes and expenses of platting when "the public good and the best interests of the estate" required platting and to sell the rest and distribute after twenty years was held insufficient.

¹⁷⁹ *Matter of Perkins*, 245 N.Y. 478, 157 N.E. 750 (1927); Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §70 (1928); *PROPERTY RESTATEMENT, App.*, Ch. A, §20 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.15 (1952). In *Taylor v. Richards*, 153 Mich. 667, 117 N.W. 208 (1908), land was devised to executors upon trust to apply the income to the support of testator's grandson, William, with discretionary power of sale for reinvestment, "title thereto to remain in my executors until he arrives at twenty-five years of age, when, if he shall show himself worthy and of steady habits, my said executors shall, if they deem it safe and for his best interest, transfer and convey said farm [to William], or in case they shall have previously sold said farm then they shall transfer to said William the proceeds . . . if they shall so deem it safe and for his best interest." No doubt these powers were not sufficient to prevent suspension of the absolute power of alienation, but, as such suspension could not last beyond a life in being, there was no violation of the statutes. In *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924), testatrix devised land to her husband until death or remarriage, with power to invade principal for his support and comfort and to convey to that end, remainder to a trustee with mandatory direction to convert to money, and hold on trust for, inter alia, unborn persons. The opinion suggests that the power of the husband, which was subject to a condition precedent which might not occur, and that of the trustee, which was not exercisable until the husband's death, did not prevent suspension of the absolute power of alienation during the life of the husband.

are payable to others, so that the giving of such consent would entail loss to the *cestuis*.¹⁸⁰ A requirement of consent of the *cestuis que trustent* or some other person before exercise of the power does not prevent destructibility, however, if the persons whose consent is required are ascertained and in being and the exercise of the power will not entail any penalty or loss to them.¹⁸¹ Moreover, if the power is immediately exercisable, a mere permission to the trustee to delay its exercise for a time or until conditions are favorable does not prevent destructibility.¹⁸² Thus in *Floyd v. Smith*,¹⁸³ an imperative power to be exercised "at the earliest time practicable after my death, without undue sacrifice of the true value thereof," was held sufficient to make destructible a trust which, in its absence, would have suspended the absolute power of alienation for four lives.

As has been seen, under the common-law Rule Against Perpetuities, the existence of a power to sell land or chattels free of future interests or to exchange for other property is not sufficient to make future interests therein destructible if the proceeds of the sale or property received in exchange are subject to the future interests.¹⁸⁴ That is to say, the common-law Rule inhibits not only the tying up of specific land or chattels for unduly long

¹⁸⁰ *Underwood v. Curtis*, 127 N.Y. 523, 28 N.E. 585 (1891); *Chaplin, id.*, §71.

¹⁸¹ *Chaplin, id.*, §81. See: *Williams v. Montgomery*, 148 N.Y. 519 at 526, 43 N.E. 57 (1896).

¹⁸² *Robert v. Corning*, 89 N.Y. 225 at 239 (1882); *Chaplin, id.*, §66; Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.7 (1952). Accord: *Fitzgerald v. City of Big Rapids*, 123 Mich. 281, 82 N.W. 56 (1900), (donee empowered to act at once but authorized to delay for three years.); *In re De Bancourt's Estate*, 279 Mich. 518, 272 N.W. 891 (1937) (direction to trustee to convert into money at or before the expiration of fifteen years).

¹⁸³ 303 Mich. 137, 5 N.W. (2d) 695 (1942).

¹⁸⁴ Part Two, notes 79, 81, *supra*.

periods, but also the tying up of aggregations of economic power even when the specific property involved can itself be alienated free of contingencies. It would have been possible to construe the New York statutes as restricting only suspension of the absolute power of alienation of specific land or chattels. The New York courts, however, accepted the common-law view by holding that, although a trustee's unconditional power to terminate the trust by sale of the corpus and distribution of the proceeds to ascertained persons in being is sufficient to make the trust destructible,¹⁸⁵ an unconditional power to sell or exchange for reinvestment, that is, one after the exercise of which the trust would continue to bind the proceeds, is not sufficient to make the trust destructible.¹⁸⁶ Because the Michigan suspension statutes, unlike those of New York, applied only to land,¹⁸⁷ the situation here was different. If a trustee had unconditional power, whether imperative or discretionary, to sell the land or exchange it for other property, it was arguable that the absolute power of alienation was not suspended, even though the proceeds would be subject to the trust. The trustee was a person in being who could convey an absolute fee in possession, and the fact that the absolute power of alienation of the proceeds would

¹⁸⁵ *Robert v. Corning*, 89 N.Y. 225 (1882); *Matter of Wilcox*, 194 N.Y. 288 at 305, 87 N.E. 497 (1909); Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§36, 65 (1928); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶20 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.15 (1952).

¹⁸⁶ *Hawley v. James*, 16 Wend. 61 at 163 (N.Y. 1836); Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §36 (1928); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶19, Ch. B, ¶56 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §§25.12, 25.15 (1952). No doubt the same rule would apply in Michigan to a power to exchange land for other Michigan land.

¹⁸⁷ Part Two, note 52, Part Three, note 8 *supra*.

be suspended was immaterial, so long as they did not consist of land.¹⁸⁸

*Thatcher v. Wardens and Vestrymen of St. Andrew's Church of Ann Arbor*¹⁸⁹ has sometimes been assumed to stand for the proposition that a trustee's discretionary power of sale for reinvestment prevented a trust of land from suspending the absolute power of alienation.¹⁹⁰ By deed of June 20, 1862, Minerva Mundy conveyed land to trustees, "to have, hold, use and enjoy the same, and lease, or dispose of the same, or cause the same to be used, and to receive the rents, profits and income thereof, and to use or dispose of the same on trust," first, for the use of the grantrix during her life; second, to pay the grantrix's debts and funeral expenses; and third, to support the grantrix's husband for life and pay the expenses of his last illness and funeral, whereupon the trust should cease. The next paragraph of the deed conveyed the legal remainder in the land to the Wardens and Vestrymen of St. Andrew's Church of Ann Arbor. Minerva Mundy died in 1871 and her heirs employed Erastus Thatcher, a lawyer, to conduct a suit to quiet title on their behalf. In 1873 the heirs conveyed to Fanny Thatcher, wife of Erastus, and in 1875 they quit claimed to the Wardens and Vestrymen, who brought an action

¹⁸⁸As the statutes making the interest of the trustee and *cestui que trust* inalienable apply in Michigan only to trusts of land (Part One, notes 638, 640, *supra*), a trust of personalty would not suspend the absolute power of alienation, even if such suspension were prohibited, unless it was a spendthrift trust.

¹⁸⁹37 Mich. 264 (1877). The facts are not fully stated in the report, which accounts for the fact that the decision has been misunderstood. They are to be found in Records & Briefs, June Term, 1877, No. 36. It is not clear, however, when the grantrix's husband died.

¹⁹⁰*Wilson v. Odell*, 58 Mich. 533, 25 N.W. 506 (1885); PROPERTY RESTATEMENT, *App.*, Ch. B, ¶56, note 222 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.41, note 5 (1952). See: *Methodist Episcopal Church of Newark v. Clark*, 41 Mich. 730 at 740, 3 N.W. 207 (1879).

of ejectment against Erastus and Fanny Thatcher. The Circuit Court entered judgment for the plaintiffs on the ground the deed to Fanny Thatcher was void as champertous. The defendants appealed, contending, *inter alia*, that the trust deed of June 20, 1862, was void because the provisions for payment of expenses of last illness and funeral caused a suspension of the absolute power of alienation for longer than two lives. The Supreme Court, in an opinion by Justice Marston, in which Chief Justice Cooley and Justices Campbell and Graves concurred, affirmed the judgment for the plaintiffs on the ground the trust deed of June 20, 1862 was valid, saying,

“We think it is a self-evident proposition that the ‘absolute power of alienation’ is not suspended, where the instrument gives the trustees power to dispose of the property at their option. Where power is given to convey the trust estate, the absolute power of alienation can in no possible way be said to be suspended. If such a power is exercised as it may at any time, the trust is at once and forever, upon the execution and delivery of the conveyance, at an end, and cannot be revived, and that such a power is good when contained in an instrument which without it would be invalid, there can be no doubt. A conveyance under such a power would be good and would pass a good title to the grantee. In order to render the instrument invalid under our statutes the power of alienation must be suspended, and the time it is so suspended must be for over two lives in being at the creation of the estate, or at least so that it may be so suspended, - - - but there is no absolute suspension whatever where the trustees have power to sell. It is true they may not dispose of the estate, but it is not a question of what they may or may not in fact do, but one of power. Have they power to sell, or is the power of sale suspended absolutely for the prohibited period? If the former, the instrument is valid; if the latter, in-

valid. *Belmont v. O'Brien*, 12 N.Y. 394; *Mason v. Mason*, 2 Sandf. Ch., 432; *Hawley v. James*, 16 Wend., 153, per Bronson, J.; *Hunter v. Hunter*, 17 Barb., 90; *Nelson v. Callow*, 15 Sim. Ch., 353; *Cresson et al v. Ferree*, 70 Pa. St., 446. The power being one which may be exercised at any time before the determination of the limitations which precede the ultimate one, renders the trust valid. Beyond this we do not express any opinion as to the correctness of the rule laid down in New York as to the proper construction of the statute.”¹⁹¹

For several reasons, the *Thatcher* case is not authority for the proposition that a trustee's discretionary power of sale for reinvestment prevented a trust for receipt of the rents and profits of land from suspending the absolute power of alienation. First, the Court treated the power not as one of sale for reinvestment but as one of sale and termination of the trust. Second, even if the power did not extend to termination of the trust, the trust was not to continue beyond the lives of Minerva Mundy and her husband except as a trust “to sell lands for the benefit of creditors.”¹⁹² As will be made clear in the next section, such a trust does not suspend the absolute power of alienation because the interests of the *cestuis que trustent* are alienable. The provision for payment of expenses of last illness and funeral, therefore, could suspend the absolute power of alienation beyond the lives of Mrs. Mundy and her husband only if it be assumed that it constituted a limitation of an indestructible future interest to creditors who might not be ascertainable or members of an ascertainable group for several days after the deaths of Mr. and Mrs. Mundy.¹⁹³ Third, even if the provision for payment of expenses of

¹⁹¹ 37 Mich. 264 at 270-271.

¹⁹² Rev. Stat. 1846, c. 63, §11 (1), Part One, notes 583, 586, *supra*.

¹⁹³ Chapter 20, Sec. A, Subsec. B. (2), *supra*.

last illness and funeral did suspend the absolute power of alienation because it was a limitation of a future interest to persons who might not be ascertainable within two lives, the validity of that interest was not involved in the litigation before the Court. All that was involved was the validity of the legal remainder limited by the deed of June 20, 1862, to the Wardens and Vestrymen. This was vested in a corporation in being, subject only to partial divestment by exercise of the power in favor of the creditors. If the interest of the creditors was void, the remainder would be valid and indefeasible.¹⁹⁴

The proposition that a trustee's discretionary power of sale for reinvestment prevents a trust from suspending the absolute power of alienation was questioned in *Palms v. Palms*¹⁹⁵ and definitely rejected in *Niles v. Mason*.¹⁹⁶ This rejection is probably justifiable on the ground that a trustee's discretionary power of sale for reinvestment is never really absolute and unconditional; under the law of trusts the trustee would be guilty of a breach of trust if he exercised it before such time as the proposed change of investments would be of benefit to the *cestuis que trustent*. Such a power is, therefore, really subject to a condition precedent. This is not true of an imperative power of sale for reinvestment which the trustee is bound

¹⁹⁴ Part Two, notes 543, 548, *supra*; Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.10 (1952).

¹⁹⁵ 68 Mich. 355 at 386, 36 N.W. 419 (1888) (Concurring opinion of Champlin and Sherwood, JJ).

¹⁹⁶ 126 Mich. 482, 86 N.W. 1100 (1901). Accord: *Grand Rapids Trust Co. v. Herbst*, 220 Mich. 321, 190 N.W. 250 (1922); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934); *In re Richards' Estate*, 283 Mich. 485, 278 N.W. 657 (1938); PROPERTY RESTATEMENT, *App.*, Ch. B, ¶56 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.41 (1952). See: *Allen v. Merrill*, 223 Mich. 467 at 471, 194 N.W. 131 (1923). Cf. *Skinner v. Taft*, 140 Mich. 282, 103 N.W. 702 (1905); *Moore v. O'Leary*, 180 Mich. 261, 146 N.W. 661 (1914).

to exercise, regardless of the resulting advantage or disadvantage to the *cestuis que trustent*. Consequently, the Michigan Supreme Court repeatedly and consistently held that an imperative power of sale for reinvestment in property other than Michigan land worked an equitable conversion, so that the trust was to be considered a trust of chattels personal, not subject to the suspension statutes, from the time when the trustee had an unconditional duty to sell.¹⁹⁷ It has been rather liberal in construing powers to be unconditional and imperative for this purpose. Thus in *Floyd v. Smith*,¹⁹⁸ land was de-

¹⁹⁷ *Penny v. Croul*, 76 Mich. 471, 43 N.W. 649, 5 L.R.A. 858 (1889) (devise of legal life estate, remainder to trustee with direction to convert at once into personalty and hold the latter on perpetual charitable trust); *Ford v. Ford*, 80 Mich. 42, 44 N.W. 1057 (1890) (mandatory direction in will to convert Michigan land into Missouri land on death of testator and to hold the Missouri land in trust for more than two lives); *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924) (devise of legal life estate, remainder to trustee to sell, convert into money, and hold the latter on trust for more than two lives); *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N.W. 703 (1930) (devise to trustee with mandatory direction to sell at once and hold proceeds on trust for more than two lives); *In re De Bancourt's Estate*, 279 Mich. 518, 272 N.W. 891 (1937) (devise to trustee to pay income to testator's heirs for fifteen years, to convert into money at or before the expiration of fifteen years, and to divide the proceeds among the heirs at the end of fifteen years, determined according to the statute then in force); *Van Tyne v. Pratt*, 291 Mich. 626, 289 N.W. 275 (1939) (devise to trustee upon trust for three lives with mandatory direction to sell land at the end of a named life); *Floyd v. Smith*, 303 Mich. 137, 5 N.W. (2d) 695 (1942), Part Three, note 198 *infra*. See: *Joseph v. Shaw*, 48 Mich. 355, 12 N.W. 486 (1882) (direction to administrator to convert land into money before distribution to life tenant); *Dodge v. Detroit Trust Co.*, 300 Mich. 575, 2 N.W. (2d) 509 (1942) (devise to trustees with mandatory direction to form a corporation, convey the land to it in exchange for its stock, and hold the stock in trust). PROPERTY RESTATEMENT, *App.*, Ch. B, ¶51 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.37 (1952). Although an imperative power to convert to personalty prevented a trust from suspending the absolute power of alienation, contingent limitations of interests under or following the trust might violate the common-law Rule Against Perpetuities. *Michigan Trust Co. v. Baker*, *Gettins v. Grand Rapids Trust Co.*, *supra*.

¹⁹⁸ 303 Mich. 137, 5 N.W. (2d) 695 (1942). See also *Penny v. Croul*, 76 Mich. 471, 43 N.W. 649 (1889).

vised to trustees upon a trust which was to last for four lives. The following language of the will was treated as creating an imperative power which prevented suspension of the absolute power of alienation:

"Any real estate constituting a part of my estate at the time of my death shall be sold and converted into personalty at the earliest time practicable after my death without undue sacrifice of the true value thereof, to the end that the trust by this will created shall be solely a trust of personalty and subject to the rules applicable thereto only."

Although a trustee's power to sell for reinvestment has never been sufficient to make the trust destructible in New York¹⁹⁹ and was not sufficient in Michigan unless imperative, a power in the trustee to terminate the trust by distributing the corpus, or by selling the corpus and distributing the proceeds, has always been sufficient in both states to prevent the trust from suspending the absolute power of alienation, whether the power is imperative or discretionary.²⁰⁰ It should be borne in mind,

¹⁹⁹ Part Three, note 186 *supra*.

²⁰⁰ Part Three, note 185 *supra*; *Gilkey v. Gilkey*, 162 Mich. 664, 127 N.W. 715 (1910) (inter vivos trust to last for three lives or twenty years, whichever was shorter, with power in the trustee to distribute the corpus whenever he deemed it advisable); *Allen v. Merrill*, 223 Mich. 467, 194 N.W. 131 (1923) (devise to trustee with discretionary power of sale and direction to distribute the corpus within five years after testator's death); *Union Guardian Trust Co. v. Nichols*, 311 Mich. 107, 18 N.W. (2d) 383 (1945) (trust mortgage with imperative power in the trustee, in the event of foreclosure, to sell the land and distribute the proceeds to holders of participation certificates). PROPERTY RESTATEMENT, *App.*, Ch. A, ¶20 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.42 (1952). See *Niles v. Mason*, 126 Mich. 482, 85 N.W. 1100 (1901); *Grand Rapids Trust Co. v. Herbst*, 220 Mich. 321, 190 N.W. 250 (1922); *In re Richard's Estate*, 283 Mich. 485, 278 N.W. 657 (1938), where it was held that a discretionary power of sale for reinvestment was not sufficient to make the trust destructible but suggested that a discretionary power to terminate the trust would be sufficient. See also *Ward v. Ward*, 163 Mich. 570, 128 N.W. 761 (1910).

however, that while a power of termination in the trustee prevents the trust, as such, from suspending the absolute power of alienation, the provisions for distribution of the corpus or its proceeds may constitute limitations of future interests in land or personalty which raise independent problems of validity. In New York, these would always be governed by the suspension statutes. In Michigan it would seem that, if the distribution was to be of land, the suspension statutes governed, but if chattels or money were to be distributed, the common-law Rule Against Perpetuities applied.²⁰¹

C. INDESTRUCTIBLE TRUSTS

Chapter 63 of the Revised Statutes of 1846 provides:

“Sec. 11. Express trusts may be created for any or either of the following purposes:

1. To sell lands for the benefit of creditors:
2. To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon:
3. To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the last preceding chapter:
4. To receive the rents and profits of lands, and to accumulate the same for the benefit of any married woman, or for either of the purposes and within the limits prescribed in the preceding chapter:
5. For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed in this title.

²⁰¹ Cf. note 197 *supra*.

"Sec. 19. No person beneficially interested in a trust for the receipt of the rents and profits of land, can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable.

"Sec. 21. When the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees, in contravention of the trust, shall be absolutely void." ²⁰²

This legislation was adopted from the New York Revised Statutes of 1829,²⁰³ but Subsection 5 of Section 11 and the provision as to married women in Subsection 4 are peculiar to Michigan.²⁰⁴

(1) Trusts for Receipt of the Rents and Profits of Land

The New York courts gave an extensive effect to the first clause of the New York equivalent of Section 19, holding not only that a *cestui que trust* of a trust for receipt of the rents and profits of land could not alienate his interest,²⁰⁵ but that, even though all the *cestuis* were

²⁰² Rev. Stat. 1846, c. 63, §§11, 19, 21; Comp. Laws (1857) §§2641, 2649, 2651; Comp. Laws (1871) §§4124, 4132, 4134; Comp. Laws (1897) §§8839, 8847, 8849; How. Stat. §§5573, 5581, 5583; Comp. Laws (1915) §§11575, 11583, 11585; Comp. Laws (1929) §§12977, 12985, 12987; Mich. Stat. Ann., §§26.61, 26.69, 26.71; Comp. Laws (1948) §§555.11, 555.19, 555.21. For the background of this legislation, see Part One at notes 575-587, *supra*.

²⁰³ Part II, c. 1, tit. II, art. second, §§55, 63, 65, Part One, notes 580, 581, *supra*. See: Part Three, note 234 *infra*.

²⁰⁴ Rev. Stat. 1846, p. V.

²⁰⁵ Douglas v. Cruger, 80 N.Y. 15 (1880). An express provision of the trust instrument, authorizing alienation by the *cestui*, has been deemed inoperative because of the statute. Crooke v. County of Kings, 97 N.Y. 421 (1884); Farmers' Loan & Trust Co. v. Kip, 192 N.Y. 266 at 280, 85 N.E. 59 (1908); Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §254 (1928); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶17 (1944); 3 Walsh, LAW OF REAL PROPERTY, §344 (1947); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.11 (1952).

in being and ascertained, they could not compel the termination of the trust²⁰⁶ or cooperate with the trustee to terminate it.²⁰⁷ Moreover, they held that the statutory inalienability of the *cestuis'* interests applied to trusts to receive and pay over the rents and profits as well as to trusts to receive and apply them.²⁰⁸ This being so, the existence of such a trust meant that there were no persons in being by whom an "absolute fee in possession"²⁰⁹ could be conveyed. In consequence, unless such a trust was destructible under the rules discussed in the preceding subsection, it suspended the absolute power of alienation even though all interests in the land were indefeasibly vested in ascertained persons in being.²¹⁰

Although the language of Subsection 5 of Section 11 indicates that, when the Michigan Legislature adopted the New York statutes governing trusts and suspension of the absolute power of alienation, it was aware of and intended to adopt the New York judicial interpretation of them, it has been seen that the Michigan Supreme Court appears to have held in *Bennett v. Chapin*²¹¹ that,

²⁰⁶ *Cuthbert v. Chauvet*, 136 N.Y. 326, 32 N.E. 1088 (1893); Part One, note 614 *supra*; Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.11 (1952).

²⁰⁷ *Dale v. Guaranty Trust Co.*, 168 App. Div. 601, 153 N.Y. Supp. 1041 (1915); Part Three, note 206 *supra*.

²⁰⁸ *Leggett v. Perkins*, 2 N.Y. 297 (1849); *Cochrane v. Schell*, 140 N.Y. 516 (1894); Part One, note 597 *supra*; PROPERTY RESTATEMENT, *App.*, Ch. A, ¶18 (1944).

²⁰⁹ Rev. Stat. 1846, c. 62, §14, Part Three, note 1 *supra*.

²¹⁰ *Coster v. Lorillard*, 14 Wend. 265 (1835); *Hawley v. James*, 16 Wend. 61 (1836); Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §§252, 255 (1928); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶17 (1944); 3 Walsh, LAW OF REAL PROPERTY, §§344, 350 (1947); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.12 (1952).

²¹¹ 77 Mich. 526, 43 N.W. 893 (1889), Part One, note 611, Part Two, note 466 *supra*. But see *Blossom v. Anketell*, (D.C. Mich. 1921) 275 F. 947. In *Conover v. Hewitt*, 125 Mich. 34, 83 N.W. 1009 (1900), land was conveyed to a trustee to apply the rents and profits to the

if the *cestuis que trustent* of a trust for receipt of the rents and profits of land were all in being and ascertained, they could compel termination of the trust and convey an absolute fee in possession. If so, it would seem to follow logically that, in Michigan, such a trust was destructible under the rules discussed in the preceding subsection ²¹² and so did not suspend the absolute power of alienation. Nevertheless, the Michigan Court held repeatedly that a trust for receipt of the rents and profits of land did suspend the absolute power of alienation even if all interests in the land were owned by ascertained living persons who, were it not for the statutory inalienability of the interests of trustee and *cestuis que trustent*, could join to convey an absolute fee in possession. In *Casgrain v. Hammond*,²¹³ land was conveyed to a trustee (1) to pay the income to the settlor for life; (2) if the settlor died within fourteen years, to pay the income to five children of the settlor or the survivors of them until the expiration of that period; (3)

use of William Fitzhugh during his life and after his death to apply them to the use of his wife and children during the life of the wife, remainder at her death to the children. After the death of William his widow released her interest to the other beneficiaries. They sued to compel termination of the trust and distribution of the corpus to them and were granted the relief sought. This decision is, of course, in flat conflict with Section 19 insofar as it holds that the interest of a beneficiary of a trust for receipt and application of the rents and profits of land is alienable.

²¹² Part Three, notes 181, 185, *supra*.

²¹³ 134 Mich. 419, 96 N.W. 510 (1903). Accord: *Scheibner v. Scheibner*, 199 Mich. 630, 165 N.W. 660 (1917) (devise to trustees to pay income to widow for life, then to pay \$75 a month to each of two sons until twenty years after testator's death, then to convert into cash and divide between the sons); *Loomis v. Laramie*, 286 Mich. 707, 282 N.W. 876 (1938) (devise to trustees to accumulate for twenty years and then distribute to six named persons, their heirs or assigns); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.41 (1952). In *James E. Scripps Corporation v. Parkinson*, 186 Mich. 663, 153 N.W. 29 (1915) it was held that a trust suspended the absolute power of alienation although the sole trustee was also the sole income beneficiary.

after the death of the settlor and the expiration of fourteen years from the date of the trust instrument, to convey the principal to the five children or the survivors of them. Although the entire fee was owned by the settlor, the trustee, who was one of the five children, and the other four children, all of whom were ascertained living persons, it was held that the trust was wholly void because it might suspend the absolute power of alienation for a period not measured by two lives in being.

Most trusts for receipt of the rents and profits of land involve suspension of the absolute power of alienation caused not only by the statutory inalienability of the interests of the trustees and *cestuis que trustent*, but by the fact that unborn or unascertained persons are entitled to the rents and profits²¹⁴ or to shares in the principal²¹⁵ at some future time. In such cases, the interests of the unborn or unascertained persons are, of course, future interests which, if indestructible, would suspend the absolute power of alienation under the rules discussed in Section A of this chapter even if there were no trust.²¹⁶ The opinions commonly fail to make a clear

²¹⁴ *Wilson v. Odell*, 58 Mich. 533, 25 N.W. 506 (1885); *Palms v. Palms*, 68 Mich. 355, 36 N.W. 419 (1888); *Ford v. Ford*, 80 Mich. 42, 44 N.W. 1057 (1890); *Dean v. Mumford*, 102 Mich. 510, 61 N.W. 7 (1894); *Cole v. Lee*, 143 Mich. 267, 106 N.W. 855 (1906); *Otis v. Arntz*, 198 Mich. 196, 164 N.W. 498 (1917); *Grand Rapids Trust Co. v. Herbst*, 220 Mich. 321, 190 N.W. 250 (1922); *Allen v. Merrill*, 223 Mich. 467, 194 N.W. 131 (1923); *Burke v. Central Trust Co.*, 258 Mich. 588, 242 N.W. 760 (1932); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934); *In re Richards' Estate*, 283 Mich. 485, 278 N.W. 657 (1938); *Dodge v. Detroit Trust Co.*, 300 Mich. 575, 2 N.W. (2d) 509 (1942).

²¹⁵ *Farrand v. Petit*, 84 Mich. 671, 48 N.W. 156 (1891); *Niles v. Mason*, 126 Mich. 482, 85 N.W. 1100 (1901); *Foster v. Stevens*, 146 Mich. 131, 109 N.W. 265 (1906); *James E. Scripps Corporation v. Parkinson*, 186 Mich. 663, 153 N.W. 29 (1915); *Van Tyne v. Pratt*, 291 Mich. 626, 289 N.W. 275 (1939); *Bateson v. Bateson*, 294 Mich. 426, 293 N.W. 705 (1940); *Miller v. Curtiss*, 328 Mich. 239, 43 N.W. (2d) 834 (1950); cases cited in preceding note.

²¹⁶ Part Three, notes 77-80, *supra*.

distinction between the two types of suspension, by trusts themselves and by future interests under or following trusts, but it is important to make that distinction because the possible duration of suspension of the one type may not, in a given case, be the same as the possible duration of suspension of the other type. If Andrew Baker devises land to James Thorpe for the life of John Stiles upon trust to apply the rents and profits to the use of John, legal remainder to the children of John who reach thirty, the remainder is a future interest which may suspend the absolute power of alienation beyond the permissible period, but suspension caused by the trust itself cannot last longer than a single life in being, that of John.

A future interest which violates the common-law Rule Against Perpetuities is wholly void, not merely void as to those parts which may suspend vesting for too long.²¹⁷ Section 14 of Chapter 62 of the Revised Statutes of 1846 applied the same rule to future interests which violate the suspension statutes by providing that "Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter."²¹⁸ The invalidity of present trusts which suspend the absolute power of alienation rested, however, on Section 15, which provided merely that "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being . . ." ²¹⁹ It would, therefore, have been possible

²¹⁷ Thus a class gift is wholly void under the common-law Rule if the interest of any member of the class may vest too remotely, even though the interests of some members are presently vested. Part Two, note 280 *supra*.

²¹⁸ Rev. Stat. 1846, c. 62, §14, Part Three, notes 1, 76, *supra*.

²¹⁹ Rev. Stat. 1846, c. 62, §15, Part Three, note 1 *supra*.

to hold that a trust set up to last for too long was void only as to the excess; for example, that a trust to last for three lives was valid for the first two lives named.²²⁰ The New York courts held, however, that a trust which, under its terms, might last longer than the statutory period was wholly void, not merely invalid as to the excess,²²¹ and Michigan followed this view.²²²

(2) Trusts for Payment of a Sum in Gross; Annuities

As the statutory inalienability created by Section 19 of Chapter 63 affects only the interests of beneficiaries under trusts, it is clear that a provision for payments to an ascertained living person which does not create a trust does not suspend the absolute power of alienation. Thus a provision for payment of a legacy, whether in a lump sum or in instalments,²²³ or a provision for payments which imposes a mere equitable charge or lien on land,²²⁴

²²⁰ Cf. Rev. Stat. 1846, c. 62, §17, Part Three, notes 1, 53, *supra*, which provided, "when a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, . . ." Under this section, if more than two successive legal life estates were limited, the first two were valid. Rev. Stat. 1846, c. 62, §38, Part Two, note 482 *supra*, provided, similarly, that a provision for an accumulation for longer than the permitted period was void only as to the excess.

²²¹ *Coster v. Lorillard*, 14 Wend. 265 (N.Y. 1835); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.12 (1952). However, if trust provisions could be construed to be separable, that is, to call for several separate trusts, some might be valid although some were void. PROPERTY RESTATEMENT, *App.*, Ch. A, ¶¶33, 47-52 (1944). The problem of separability will be discussed in Chapter 21, *infra*.

²²² Part Three, notes 213-215, Part Two, note 541 *supra*.

²²³ See: *Radley v. Kuhn*, 97 N.Y. 26 (1884).

²²⁴ *Torpy v. Betts*, 123 Mich. 239, 81 N.W. 1094 (1900); *McInerney v. Haase*, 163 Mich. 364, 128 N.W. 215 (1910); *Peoples' Trust Co. v. Flynn*, 188 N.Y. 385, 80 N.E. 1098 (1907); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶53 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.15 (1952). When the amount payable to the beneficiary is fixed as to total or as to periodical payment and thus does not depend upon the amount of rents and profits actually earned, the provision is a charge.

does not effect suspension. If a provision does create a trust, it becomes necessary to determine whether it is for "the receipt of the rents and profits" or the "payment of a sum in gross." If Andrew Baker devises land to James Thorpe on trust to receive the rents and profits and apply them to the use of John Stiles, his wife, and children, during their lives, it is clear that Section 19 makes the interests of the beneficiaries inalienable. If Andrew Baker devises land to James Thorpe on trust to sell, mortgage, or lease in order to raise the sum of \$10,000, to pay this sum to John Stiles, and then to transfer the balance of the proceeds of sale or the land subject to the mortgage or lease to Lucy Baker, it is equally clear that the interests of the beneficiaries are alienable.²²⁵ The provisions which have caused difficulty are those which call for periodic payments in fixed amounts, usually referred to as "annuities." If such a provision creates only an equitable charge, with priority over the

²²⁵ In *Fredericks v. Near*, 260 Mich. 627, 245 N.W. 537 (1932), a husband and wife conveyed land to a trustee to sell it and pay a debt of the husband to a corporation. Being unable to make a sale, the trustee, with the consent of the corporation, reconveyed to the settlors. Because this was a trust "to sell lands for the benefit of creditors" created under Subsection 1 of Sec. 11 (Part Three, note 202 *supra*), not a trust "for the receipt of the rents and profits of lands," and because it was "for the payment of a sum in gross," the interest of the beneficiary was alienable under §19. Hence it was correctly held that the reconveyance effectively terminated the trust. In *re De Bancourt's Estate*, 279 Mich. 518, 272 N.W. 891 (1937), involved a devise to a trustee to pay \$10,000 to the Salvation Army in Jackson upon the performance of a condition precedent. Because this was a trust "to sell . . . lands, for the benefit of legatees" created under Subsection 2 of Sec. 11 (Part Three, note 202 *supra*), not a trust "for the receipt of the rents and profits of lands," and because it was "for the payment of a sum in gross," the interest of the beneficiary was alienable under §19. In *Fox v. Greene*, 289 Mich. 179, 286 N.W. 203 (1939), land was conveyed to trustees to subdivide, sell, and distribute the proceeds to the settlors. Because this was a trust to sell and distribute the proceeds, not one to hold and receive the rents and profits, the interests of the beneficiaries were properly treated as alienable.

trust, the New York decisions are to the effect that it does not suspend the absolute power of alienation.²²⁶ If, on the other hand, a trust is created and the payments are to be made exclusively from the rents and profits, such an annuity does suspend the absolute power of alienation.²²⁷ If the provisions in question create a trust and make an annuity payable from principal or from both principal and income, it is held in New York that the annuity does not effect suspension and does not prolong the duration of the trust.²²⁸ After the trust terminates, such an annuity becomes a mere equitable charge.²²⁹ If Andrew Baker devises land to James Thorpe upon trust to pay \$5000 per year to Lucy Baker for life, using either income or principal therefor, and, subject thereto, to pay the net income to John Stiles for life, then to William Stiles for life, residue to the heirs of the testator, the trust is treated as terminating with the deaths of John and William. If Lucy Baker is alive at that time, her annuity continues only as an equitable

²²⁶ Part Three, note 224 *supra*.

²²⁷ *Cochrane v. Schell*, 140 N.Y. 516, 35 N.E. 871 (1894); Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §250 (1928).

²²⁸ *Clark v. Clark*, 147 N.Y. 639, 42 N.E. 275 (1895); Chaplin, *id.*, §249; *Whiteside, id.*, §25.15. Subsection 2 of Section 55 of the New York statute (Part One, note 580, Part Three, note 203, *supra*) was amended by Laws 1909, ch. 52, to read, "To sell, mortgage or lease real property for the benefit of *annuitants or other* legatees, or for the purpose of satisfying any charge thereon." Section 63 was amended to read, "The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, can not be transferred by assignment or otherwise, but the right and interest of the beneficiary of any other trust in real property, . . . may be transferred." Real Property, Law, §§96, 103. These amendments served to confirm the existing judicial construction of the original sections.

²²⁹ *Buchanan v. Little*, 154 N.Y. 147, 47 N.E. 970 (1897); Powell and Whiteside, *THE STATUTES OF THE STATE OF NEW YORK CONCERNING PERPETUITIES AND RELATED MATTERS*, 102 [N.Y. Legislative Document (1936) No. 65 (H).] Cf. *Burke v. Central Trust Co.*, Part Three, note 247 *infra*, where it was suggested that an express provision to this effect would be valid.

charge, which does not suspend the absolute power of alienation. The Michigan decisions involving these problems are neither clear nor harmonious and so require detailed discussion.

In *Toms v. Williams*,²³⁰ the testatrix owned land subject to a forty-year lease which provided that the lessor would pay for the lessee's improvements at the expiration of the term or renew the lease for an additional forty years. At the time of the testatrix's death, the original term had eighteen years to run. She devised this and other property to trustees (1) to set aside \$5,000 per annum to form a sinking fund to pay for the lessee's improvements; (2) to accumulate the balance of the income and pay it over to two nephews and a niece when the youngest attained majority; (3) to transfer the principal to the nephews and niece as soon as the lessee's improvements were paid for. It was held that this was a trust to "lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon" within the meaning of Subsection 2 of Section 11 and that it was not subject to the suspension statutes. The opinion suggests that trusts falling under Subsection 1, to sell lands for the benefit of creditors, were also exempt from the suspension statutes.

*Russell v. Musson*²³¹ involved a devise to a son and his wife for their lives, remainder to the children of the son who survived him but, if there were no such children, remainder to Josiah and Hannah Musson, charged with the support of their mother, and if either die with-

²³⁰ 41 Mich. 552, 2 N.W. 814 (1879). The lessee's interest under the trust was alienable. The provision for accumulation of the balance of the income was held not to exceed the permissible duration. Part Two, notes 485-487, *supra*. See Part Three, note 225 *supra*.

²³¹ 240 Mich. 631, 216 N.W. 428 (1927). Accord: *Matter of Bloodgood*, 184 App. Div. 798, 172 N.Y.S. 509 (1918).

out issue, to the survivor; if both die without issue, to their mother. Under this devise, after the death of the son, all interests in the land would necessarily be held by ascertained living persons, the son's wife, Josiah, Hannah, and their mother. Hence the entire fee would be freely alienable after a single life in being unless the provision for support of the mother made her the beneficiary of a trust for receipt of the rents and profits of lands so that her interest thereunder was inalienable. It was held that her interest was alienable and that the disposition could not suspend the absolute power of alienation beyond the son's life. This decision was sound because the provision for support created an equitable charge, not a trust.²³² The interest of the beneficiary of an equitable charge is not made inalienable by statute; hence such a charge in favor of an ascertained living person does not suspend the absolute power of alienation.

In *Wilson v. Odell*,²³³ a testator devised his entire estate to trustees with power to sell land, "except as otherwise provided, at such times and in such parcels as they shall deem advisable, and out of said property pay" (1) funeral expenses and the cost of a monument; (2) an annuity of \$1500 to his widow; (3) annuities to each of his three children of \$600 while under fourteen and \$1000 beyond that age; (4) two pecuniary legacies. Subsequent clauses directed retention of certain parcels of land for the purpose of aiding in carrying out the third purpose, devised the residue to his grandchildren after the death of all his children and on the majority

²³² TRUSTS RESTATEMENT, §10 (1935). An equitable charge differs from a trust in that it is a mere lien on land, the legal owner of which holds for his own benefit without fiduciary duties to the beneficiary of the charge, whereas a trustee holds for the benefit of the *cestuis que trustent* and owes fiduciary duties to them. The holder of an equitable charge is, in effect, a mortgagee.

²³³ 58 Mich. 533, 25 N.W. 506 (1885).

of the youngest grandchild, and directed that the annuity of any deceased child be continued to its children until the division. It was held that these dispositions were valid as to the land subject to the trustees' power of sale.²³⁴ Insofar as they related to land not subject to sale, it was held that the implied direction to accumulate surplus rents and profits was valid only during the minority of the children,²³⁵ that the limitations to the grandchildren were void, and that the trust would terminate when the children came of age, at which time the land would pass to the heirs, subject to the children's annuities. The opinion does not discuss the problem of whether the annuities of the children suspended the absolute power of alienation, but the fact that they were treated as valid indicates that the Court thought they did not.

*Dean v. Mumford*²³⁶ involved a will which devised the use of testator's homestead to his widow for life, directed the executors to pay the taxes and repairs thereon from the estate, bequeathed a life annuity of \$1500 to the widow, and devised the residue to his five children. The will provided that the executors should hold the shares of three sons on trust for these sons, their wives and children, during the lives of the sons and their wives, remainder to their children. It was held that the latter provision was for three separate trusts, each for the life of a son and his wife, but that the provisions for payment of taxes and repairs and the annuity to the widow created a trust which suspended the absolute power of alienation for her life. As to each of the three shares, therefore, the absolute power of alienation was sus-

²³⁴ Part Three, note 190 *supra*.

²³⁵ Part Two, note 489 *supra*.

²³⁶ 102 Mich. 510, 61 N.W. 7 (1894). The widow elected to take against the will, so the validity of the provisions for her was not in question.

pended for three lives, those of the widow, a son, and his wife. The trusts for the sons, their wives and children, and the remainders thereafter to the sons' children were held void.²³⁷

In *Niles v. Mason*,²³⁸ an estate was devised to a trustee (1) to pay debts, funeral expenses, and a small legacy; (2) to pay \$12.50 per month to sister Sarah for life, but, "upon the event of her marriage the said legacy to cease, and to become part of the income hereinafter provided for;" (3) subject to the foregoing, to pay half the income to son Charles for life and half to daughter Lottie for life; if either die without issue, the whole income to the survivor for life, remainder to the issue of Charles and Lottie or, if there should be none, to a brother. It was held that the provision for an annuity to the sister suspended the absolute power of alienation during her life and that the other provisions suspended it during the lives of Charles and Lottie, making three lives; that the trust for Charles and Lottie and the remainders were void, but that the annuity, being separable, was valid. Before the case was decided the trustee had executed a mortgage to the sister to secure payment of the annuity, and the Court approved his act in doing so, thus indicating that it considered the annuity a charge on principal, not merely on the rents and profits. As has been seen, such an annuity does not suspend the absolute power of alienation under the New York decisions.²³⁹

*Van Driele v. Kotvis*²⁴⁰ involved a will which pro-

²³⁷ Part Two, note 562 *supra*.

²³⁸ 126 Mich. 482, 85 N.W. 1100 (1901).

²³⁹ Part Three, note 228 *supra*.

²⁴⁰ 135 Mich. 181, 97 N.W. 700 (1903). *Contra*: *Otis v. Arntz*, 198 Mich. 196, 164 N.W. 498 (1917) (bequest to church of \$25 a year for ten years, "the said sum to be taken from the income of my estate.") But the will in this case became effective in 1916, after the enactment of Act 122 of 1907, Part Two, note 421 *supra*.

vided, "I - - - bequeath to the Fourth Dutch Reformed Church - - - the sum of five hundred dollars, to be paid by my executor out of the rents, issues, and profits of my estate in the manner following, to wit: Twenty-five dollars per year, for a period of twenty years." The provision was held invalid on the ground that it suspended the absolute power of alienation for twenty years.

In *Skinner v. Taft*,²⁴¹ a testator devised his estate to trustees to pay "out of the interest, income and profits" \$5,000 per year to his widow and \$1,666.66 to each of his three children. The will provided, "the trust herein and hereby created . . . shall terminate five years from the date of the probating of my will," at which time the trustees were directed to distribute the principal to the wife and children in equal shares. The income was insufficient to pay the annuities, and the widow sought a decision that they were a charge on principal. It was held that they were not in an opinion which assumed that, as so construed, the trust was valid. If, as appears to have been the case, the estate included land, the implied holding that the trust did not suspend the absolute power of alienation seems irreconcilable with the previous Michigan decisions discussed above.

*Cole v. Lee*²⁴² involved a will which directed the executors (1) to pay Phebe Simons \$200 a year for life; (2) to provide Carrie Humphrey with a home costing not more than \$2,000, pay her \$50 a month for life, and "to make such further expenditures as may be necessary to secure her maintenance in ease and comfort;" (3) to pay the living expenses of Frank Cole, his wife and children, during the lives of Frank and wife. Subject to these provisions and some outright legacies, the residue

²⁴¹ 140 Mich. 282, 103 N.W. 702 (1905).

²⁴² 143 Mich. 267, 106 N.W. 855 (1906).

was devised to the children of Frank, whenever born. It was held that the will created a valid trust for the lives of Frank and his wife. The opinion does not mention the Simons annuity but states, "The charge of an annuity in favor of Mrs. Humphrey does not prevent the vesting of the estate, as the amount is fixed."

The will involved in *Hull v. Osborn*²⁴³ directed the "executors and trustees" to pay (1) testator's widow \$250 per month during her lifetime, an additional \$150 per month on demand, and a sum sufficient to pay taxes, insurance, and repairs on her home; (2) Fred Rowley \$150 per year during the life of Carrie Rowley for the use of Carrie. The residue was devised to Blanche and Frances Hull in equal shares, each to be paid \$10,000 at 21, \$10,000 at 25, \$10,000 at 30, \$10,000 at 35, \$10,000 at 40, and the balance of her half at 45. The will further provided that, if Blanche or Frances died under 45, without issue, payments due her should be made to the survivor at the same times, and that if both died without issue, the payments due them should be made to a number of relatives to be ascertained at that time. The executors and trustees were directed to keep the assets safely invested until distribution. When both were under 30, Blanche and Frances sued to compel termination of the trust and distribution of the entire principal to them. An order sustaining a demurrer to the bill was affirmed in an opinion which states that the provisions for Blanche and Francis did not create a trust and, because their interests were vested, did not violate the suspension statutes, and that the provision for distribution of the residue in the event both Blanche and Frances died without issue did not suspend the absolute power of alienation beyond two lives. Although the

²⁴³ 151 Mich. 8, 113 N.W. 784 (1908).

opinion does not mention the annuities to the widow and Fred Rowley, the decision necessarily assumes that they did not suspend the absolute power of alienation. This assumption also seems inconsistent with earlier decisions.

In *Scheibner v. Scheibner*,²⁴⁴ the residue of an estate was devised to trustees (1) to pay the income to the testator's widow for life; (2) to pay to the testator's two sons \$75 "a month each, from and after the death of my said wife, until the expiration of a period of twenty years from the date of my death, during which time I direct that none of my property shall be sold or mortgaged;" (3) to convert the estate into cash at the end of the twenty years and pay it to the sons. It was held that a bill of complaint praying that this trust be declared void as suspending the absolute power of alienation beyond two lives stated a cause of action.

*Grand Rapids Trust Co. v. Herbst*²⁴⁵ involved a will which (1) directed payment of \$75 per month each to two nephews and a niece during their lives; (2) directed division of the remainder of the net income among a son, a brother, and two sisters in equal shares; (3) devised to the son, when and if he reached 25, half the estate outright and the other half charged with payment of the \$75 a month to each nephew and niece and the remainder of the net income therefrom to the brother and sisters and the survivor of them during life; (4) if the son died under 25 leaving issue, devised half the estate to trustees to apply principal and income to the support of the issue until 21 or earlier death; principal to the issue at 21; (5) if the son died under 25 without issue or with issue which failed to reach 21, devised the

²⁴⁴ 199 Mich. 630, 165 N.W. 660 (1917).

²⁴⁵ 220 Mich. 321, 190 N.W. 250 (1922).

entire estate to four named charitable institutions, subject to the payments specified in (3). It was held that all of these provisions were void, the opinion saying,

“Counsel for sustaining the will contended no trust is created by the will except for the unborn issue of testator’s son, and designating as ‘annuities’ the monthly payments provided for the nephews and niece in paragraphs 3-5, urge that they are thereby made outright bequests of definite sums of money to be paid the beneficiaries by the executors. But the next paragraph (6) directs ‘the remainder of the net income,’ not the income of the remainder, to ‘be equally divided between’ testator’s son, brother and two sisters, and although by paragraph 7 an ownership accrues to the son if he lives until 25 years old which relieves one-half of the estate of the monthly payments to nephews and niece, the brothers and sisters yet receive ‘the balance of the net income’ of the remaining half after payment of the \$75 per month each provided for the nephews and niece, thus plainly providing that their monthly payments are to be taken from net income and are not annuities. An annuity is ‘A yearly payment of a certain sum of money, granted to another in fee, for life or years, charging the person of the grantor only’ (Burrill’s Law Dict.), distinguished from an ‘income’ by the latter being interest or profits to be earned. - - -

“- - - the life beneficiaries being interested in the rents and profits of the real estate to which it relates, we are unable to see how against the prohibition of this statute²⁴⁶ those beneficiaries can relieve it of that burden by disposing of their interests. The interests of the life beneficiaries are not sums in gross but portions of an income, or rents and profits of ultimate indeterminate amount, even as to those given a stated monthly stipend owing to uncertainty of their respective lives.”²⁴⁷

²⁴⁶ Rev. Stat. 1846, c. 63, §19, Part Three, note 202 *supra*.

²⁴⁷ 220 Mich. 321 at 327-329.

In *Burke v. Central Trust Co.*,²⁴⁸ a testatrix devised her estate to a trustee (1) to pay Mary Burke \$300 per month for life out of income or, if necessary, out of principal; (2) to pay stipulated monthly sums out of income to each of five named persons for life; (3) when the youngest child of grandnephew Frank Burke, whenever born, reached 25, to transfer the principal and any accumulated income to the children of Frank then living, subject to a lien to ensure payment of the monthly payments specified in (1) and (2). A codicil provided for payment of \$300 per month to the guardian of Frank's children from the death of their parents until the termination of the trust. It was held that the entire trust was void but suggested that, if the will had provided that the trust should terminate when the youngest child of Frank then in being reached 25, the provisions would have been valid. This, in effect, is dictum that, after the termination of the trust, the annuities would be mere equitable charges which would not suspend the absolute power of alienation.

*In re Wagar's Estate*²⁴⁹ involved a will which devised the estate to a trustee (1) to pay the entire income to the widow for life; (2) after the death of the widow, to pay stipulated monthly sums from the "rents and earnings" to each of three named children and three named grandchildren until the death of the survivor of the children, the heirs of any of the six persons who died before the termination of the trust to receive the amounts otherwise payable to the person so dying. The only question raised in the litigation was whether the

²⁴⁸ 258 Mich. 588, 242 N.W. 760 (1932).

²⁴⁹ 295 Mich. 463, 295 N.W. 227 (1940). Cf. *Dodge v. Detroit Trust Co.*, 300 Mich. 575, 2 N.W. (2d) 509 (1942), where a number of annuities under a trust were involved but their validity was not determined.

widow of one of the children was an "heir" for this purpose. In an opinion which does not discuss the validity of the trust it was held that she was.

It would seem from the cases just reviewed that, in Michigan as in New York, a provision for an annuity which created a mere equitable charge and not a trust did not suspend the absolute power of alienation.²⁵⁰ Several of the decisions, however, found that a trust was created in situations where an equitable charge construction would have been possible.²⁵¹ When the language used was construed to create a trust, the Michigan decisions are not consistent. It will be recalled that, under the New York decisions, an annuity payable under a trust suspends the absolute power of alienation if it is to be paid exclusively from the rents and profits²⁵² but does not if it is to be paid from principal or from both principal and income.²⁵³ Three of the Michigan cases involving an annuity payable under a trust exclusively from rents and profits held that it did effect suspension,²⁵⁴ and two appear to have held that it did not.²⁵⁵ Two Michigan decisions held that an annuity pay-

²⁵⁰ *Russell v. Musson*, Part Three, note 231 *supra*. *Wilson v. Odell*, Part Three, note 233 *supra*, *Cole v. Lee*, Part Three, note 242 *supra*, and *Hull v. Osborn*, Part Three, note 243 *supra*, are probably decisions to this effect. The dictum in *Burke v. Central Trust Co.*, Part Three, note 248 *supra*, also appears to support this proposition.

²⁵¹ *Dean v. Mumford*, Part Three, note 236 *supra*; *Van Driele v. Kotvis*, Part Three, note 240 *supra*; *Grand Rapids Trust Co. v. Herbst*, Part Three, note 245 *supra*.

²⁵² Part Three, note 227 *supra*.

²⁵³ Part Three, note 228 *supra*.

²⁵⁴ *Van Driele v. Kotvis*, Part Three, note 240 *supra*; *Scheibner v. Scheibner*, Part Three, note 244 *supra*; *Grand Rapids Trust Co. v. Herbst*, Part Three, note 245 *supra*. Cf. *Burke v. Central Trust Co.*, Part Three, note 248 *supra*.

²⁵⁵ *Skinner v. Taft*, Part Three, note 241 *supra*; *In re Wagar's Estate*, Part Three, note 249 *supra*. The *Wagar* decision may have assumed or held that the provisions were valid either because the probate order of distribution to the trustee was *res judicata* on this point [*Snyder v. Potter*, 328 Mich. 236, 43 N.W. (2d) 922 (1950)] or

able under a trust from both principal and income suspended the absolute power of alienation,²⁵⁶ and two others which involved this problem did not clearly decide it.²⁵⁷ In this state of the authorities, it would be hazardous to venture an opinion as to when an annuity under a trust suspended the absolute power of alienation in Michigan. As Section 19 of Chapter 63 of the Revised Statutes of 1846²⁵⁸ has not been repealed, the problem of the alienability of such annuities may still arise, even though the instrument creating them became effective after the repeal of the suspension statutes.

If the settlor of an *inter vivos* trust is also a beneficiary, it is held in New York that his beneficial interest is alienable and so does not suspend the absolute power of alienation.²⁵⁹ Hence a trust to last for the lives of the settlor and two other persons is valid. The plaintiff in *Bateson v. Bateson*²⁶⁰ conveyed land to a trustee (1) to pay the entire income to the settlor during his lifetime; (2) after the settlor's death to hold 2/10 of the

because the suspension effected could not extend beyond the permissible statutory period. In *Sprague v. Moore*, 130 Mich. 92, 89 N.W. 712 (1902), a mother conveyed land to a daughter on trust to use the income to support the settlor and pay not to exceed \$1000 per year to each of the settlor's seven children and one grandchild, these eight to receive the principal on the death of the settlor. The opinion appears to treat the interests of the children and grandchild as to income as alienable. If so, they did not suspend the absolute power of alienation.

²⁵⁶ *Dean v. Mumford*, Part Three, note 236 *supra*; *Niles v. Mason*, Part Three, note 238 *supra*. Cf. *Burke v. Central Trust Co.*, Part Three, note 248 *supra*.

²⁵⁷ *Wilson v. Odell*, Part Three, note 233 *supra*; *Burke v. Central Trust Co.*, Part Three, note 248 *supra*.

²⁵⁸ Part Three, note 202 *supra*.

²⁵⁹ *Schenck v. Barnes*, 156 N.Y. 316, 50 N.E. 967 (1898); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.15 (1952).

²⁶⁰ 294 Mich. 426, 293 N.W. 705 (1940). Cf. *Lewis v. Nelson*, 4 Mich. 630 (1857); *Casgrain v. Hammond*, 134 Mich. 419, 96 N.W. 510 (1903), Part Three, note 213 *supra*. See Part One, *supra*, at notes 626-632.

corpus in trust and pay the income therefrom to James for 15 years; (3) at the expiration of the 15 years to convey this $\frac{2}{10}$ of the corpus to James in fee; (4) if James should die within the 15 years, to convey the fee to his wife and children; but if there were none, to convey $\frac{1}{10}$ to George and hold the other $\frac{1}{10}$ on trust and pay the income therefrom to Samuel for life and, on his death, to convey the corpus to Samuel's wife and children. The Court disagreed as to the validity of the provision relative to George, but all the justices agreed that the provisions as to the $\frac{1}{10}$ to be held in trust for the lives of the settlor, James, and Samuel suspended the absolute power of alienation for three lives and so were void. This decision is, therefore, contrary to the New York view.

The application of the suspension statutes to charitable and honorary trusts has been discussed in Chapter 16.²⁶¹ The situations in which a trust does not suspend the absolute power of alienation because it is destructible by the exercise of a power have been discussed in the preceding section of this chapter.

²⁶¹ Part Two, *supra*, at notes 406-428, 432, 437-447.

The Statutory Period

CHAPTER 62 of the Revised Statutes of 1846 provided:

"Sec. 15. The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section.

"Sec. 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any contingency by which the estate of such persons may be determined before they attain their full age.

"Sec. 30. When a future estate shall be limited to heirs, or issue, or children, posthumous children shall be entitled to take, in the same manner as if born before the death of the parents.

"Sec. 31. A future estate depending on the contingency of the death of any person without heirs or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent.

"Sec. 41. The delivery of the grant, where an expectant estate is created by grant; and where it is created by devise, the death of the testator, shall be deemed the time of the creation of the estate."²⁶²

²⁶² Rev. Stat. 1846, c. 62, §§15, 16, 30, 31, 41; Comp. Laws (1857) §§2599, 2600, 2614, 2615, 2625; Comp. Laws (1871) §§4082, 4083, 4097, 4098, 4108; Comp. Laws (1897) §§8797, 8798, 8812, 8813, 8823; How. Stat., §§5531, 5532, 5546, 5547, 5557; Comp. Laws (1915) §§11533, 11534, 11548, 11549, 11559; Comp. Laws (1929) §§12935,

The period of permissible suspension of the absolute power of alienation under Sections 15 and 16 differs from the period of permissible suspension of vesting under the common-law Rule Against Perpetuities in three respects: (1) Whereas under the common-law Rule there may be suspension for any number of lives in being,²⁶³ under the statutes the number of lives in being is limited to two. (2) Whereas under the common-law Rule suspension is always permissible during the minority of a person who is not in being at the commencement of the period but will certainly come into being, if at all, within lives in being,²⁶⁴ suspension is permissible under the statutes during such a minority only if the minor is certain to come into being, if at all, within two lives and only when the minor is entitled to a fee defeasible by a condition occurring during minority. (3) Whereas under the common-law Rule suspension is permissible during a gross period of twenty-one years or less, unconnected with an actual minority, whether or not such period follows lives in being,²⁶⁵ the statutes do not permit suspension for any period in gross whatever.

A. COMMENCEMENT OF THE PERIOD

Under both the common-law Rule Against Perpetuities and the statutes, the period is computed, as to an interest which is indestructible from its creation, from the time when the instrument creating the interest becomes effective. In the case of a deed, this is the time of

12936, 12950, 12951, 12961; Mich. Stat. Ann., §§26.15, 26.16, 26.30, 26.31, 26.41; Comp. Laws (1948) §§554.15, 554.16, 554.30, 554.31, 554.41. Sections 15 and 16 were repealed by Act 38, P.A. 1949, Mich. Stat. Ann., §26.49 (2); Comp. Laws (1948) §554.52. As to the limited effect of this repeal see Part Three at note 3 *supra*.

²⁶³ Part Two, note 95 *supra*.

²⁶⁴ Part Two, notes 31, 101, *supra*.

²⁶⁵ Part Two, notes 35, 112-115, *supra*.

delivery; in the case of a will, the death of the testator.²⁶⁶ Under both the common-law Rule and the statutes, an interest created by the exercise of a power of appointment is normally deemed, for this purpose, to be created by the instrument creating the power rather than by the instrument exercising it.²⁶⁷ However, under the common-law Rule, an interest created by the exercise of a power of appointment which is unlimited as to objects and exercisable by deed, is deemed to be created by the instrument exercising the power,²⁶⁸ and this is true under the statutes as to an interest created by exercise of an absolute power of disposition of the entire fee.²⁶⁹ Under both the common-law Rule and the statutes, the commencement of the period may be postponed by the existence of destructibility. What constitutes destructibility, however, is not the same under the statutes as at common law.²⁷⁰

B. THE REQUIREMENT OF CERTAINTY

Under both the common-law Rule Against Perpetuities and the statutes, an interest which is indestructible from its creation and not created by exercise of a power is invalid unless, at the time when the creating instrument becomes effective, it is absolutely certain that the interest will not effect suspension for longer than the permissible period; a high degree of probability is not enough. If, viewed from that time, any combination of future events which would extend suspension beyond

²⁶⁶ Part Two, note 63 *supra*; Rev. Stat. 1846, c. 62, §§15, 41, Part Three, note 262 *supra*; Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §88 (1928).

²⁶⁷ Part Two, notes 318, 322, Part Three, note 145, *supra*.

²⁶⁸ Part Two, note 301 *supra*.

²⁶⁹ Part Two, note 305, Part Three, note 148, *supra*.

²⁷⁰ Part Two, notes 70-81, Chapter 20, Section B (3), *supra*.

the permissible period is possible, the interest is void, although the actual occurrence of that combination of events is highly unlikely and even though, by the time the validity of the interest is litigated, it has become manifest that they did not or cannot occur.²⁷¹ In determining this certainty it is always deemed possible, under the statutes as at common law, that a living person may marry a person as yet unborn,²⁷² that a living person, regardless of age or physical condition, is capable of having children,²⁷³ and that such administrative steps as

²⁷¹ Part Two, note 130, *supra*; *Wilson v. Odell*, 58 Mich. 533, 25 N.W. 506 (1885); *State v. Holmes*, 115 Mich. 456, 73 N.W. 548 (1898); *Niles v. Mason*, 126 Mich. 482, 85 N.W. 1100 (1901); *Casgrain v. Hammond*, 134 Mich. 419, 96 N.W. 510 (1903); *Scheibner v. Scheibner*, 199 Mich. 630, 165 N.W. 660 (1917); *Rozell v. Rozell*, 217 Mich. 324, 186 N.W. 489 (1922); *Grand Rapids Trust Co. v. Herbst*, 220 Mich. 321, 190 N.W. 250 (1922); *Burke v. Central Trust Co.*, 258 Mich. 588, 242 N.W. 760 (1932); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934); *Bateson v. Bateson*, 294 Mich. 426, 293 N.W. 705 (1940); *Chaplin*, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §92 (1928); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶¶31, 32 (1944); See: *Foster v. Stevens*, 146 Mich. 131, 109 N.W. 265 (1906); *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N.W. 703 (1930); *Miller v. Curtiss*, 328 Mich. 239, 43 N.W. (2d) 834 (1950).

²⁷² Part Two, note 131 *supra*; *Schettler v. Smith*, 41 N.Y. 328 (1869); *Chaplin*, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §115 (1928); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶32 (1944). That is to say, if a limitation is construed to be to, or measured by the life of, anyone whom a named person may marry in the future, it is possible that the spouse may be a person as yet unborn. But in *Dean v. Mumford*, 102 Mich. 510 at 515, 61 N.W. 7 (1894), where a will, as construed by the court, created a trust to last for the lives of the testator's widow, his unmarried son, and the son's wife, it was said, "But it is suggested that, in this view, as Herbert L. was unmarried at the time the will took effect, the will should be construed to relate to any wife whom he might in the future marry, and, so construed, the estate would not vest in the children or heirs until after the expiration of two lives in being. We think the will not open to this construction, but that it was intended to mean any wife of Herbert L. living at the time of the decease of the testator." A limitation in favor of the wife of a married person is normally construed to refer to his existing wife. *Conover v. Hewitt*, 125 Mich. 34, 83 N.W. 1009 (1900); *Cole v. Lee*, 143 Mich. 267, 106 N.W. 855 (1906).

²⁷³ Part Two, notes 138-141, *supra*; *Rozell v. Rozell*, 217 Mich. 324, 186 N.W. 489 (1922); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶31, Ch. B,

probating a will may not be taken within a predictable time.²⁷⁴ If the time when the absolute certainty must exist is the effective date of the instrument creating the interest, it follows that events which occur before that time may be considered in determining certainty but events which occur thereafter may not. As a will becomes effective upon the death of the testator, events which occur after the execution of the will and before such death may be considered;²⁷⁵ events which occur after the testator's death may not.²⁷⁶

¶56 (1944). See: *Van Gallow v. Brandt*, 168 Mich. 642 at 647, 134 N.W. 1018 (1912) (woman aged 68; suggestion that it would make no difference if she were 100). Accord under the common-law Rule: *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N.W. 703 (1930), Part Two, note 145 *supra*.

²⁷⁴ Part Two, note 134 *supra*. Thus in *Battelle v. Parks*, 2 Mich. 531 (1853), it was suggested that a devise of a beneficial power to the testator's administrator would be void because of the possible delay in appointing an administrator, and in *Thatcher v. Wardens & Vestrymen of St. Andrew's Church of Ann Arbor*, 37 Mich. 264 (1877), Part Three, note 189 *supra*, it was assumed that a direction to a trustee to pay the expenses of last illness and funeral of a *cestui que trust* could suspend the absolute power of alienation for a period not limited by two lives. In both New York and Michigan there is a strong tendency to construe provisions postponing distribution until the completion of some administrative step as not suspending the absolute power of alienation in the meantime. PROPERTY RESTATEMENT, *App.*, Ch. A, ¶66 (1944); *Fitzgerald v. City of Big Rapids*, 123 Mich. 281, 82 N.W. 56 (1900) (discretionary power in executor to withhold distribution of residue until payment of debts and other legacies; Court remarked that such delay would be necessary in the absence of the provision); *Moss v. Axford*, 246 Mich. 288, 224 N.W. 425 (1929) (devise to person to be selected by executor valid; suggestion that the ordinary delays in the settlement of an estate are not within the reason of the statute); *McGraw v. McGraw*, 176 Fed. 312 (6th Cir. 1910) (devise to trustee to convey to named persons after two lives and payment of testator's debts). Cf. *De Buck v. Bousson*, 295 Mich. 164, 294 N.W. 135 (1940).

²⁷⁵ *Mullreed v. Clark*, 110 Mich. 229, 68 N.W. 138 (1896) (will suspended the absolute power of alienation for lives of testator's wife and two children; death of wife before testator prevented invalidity); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶29, Ch. B, ¶56 (1944). Accord, under the common-law Rule: Part Two, note 125 *supra*.

²⁷⁶ *Dean v. Mumford*, 102 Mich. 510, 61 N.W. 7 (1894) (will suspended the absolute power of alienation for lives of testator's wife, son, and the son's wife; widow's election to take against the will did

Under the common-law Rule Against Perpetuities, there are two situations in which the absolute certainty that an interest will not suspend vesting for longer than the permissible period need not exist at the time when the creating instrument becomes effective. When an interest will be destructible for a time and then indestructible for a time, it is sufficient if the certainty that it will vest in due time exists when the indestructibility commences; that is, events which occur between the effective date of the creating instrument and the end of the period of destructibility may be considered in determining certainty.²⁷⁷ When the interest is created by exercise of a power of appointment, it is sufficient if certainty exists when the power is exercised, even though the period of the Rule is computed from the effective date of the instrument creating the power; that is, events which occur between the creation of the power and its exercise may be considered in determining certainty.²⁷⁸ Under the statutes, however, it may be that, in all cases, it must be absolutely certain at the time when the creating instrument becomes effective that any suspension of the absolute power of alienation effected thereby will terminate within the statutory period; that is, events which occur after the effective date of the creating instrument can never be considered in determining certainty.²⁷⁹ It may be that this is so even though, because

not prevent invalidity); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶30, Ch. B, ¶56 (1944). *Cf.* Allen v. Merrill, 223 Mich. 467, 194 N.W. 131 (1923). Accord, under the common-law Rule: Part Two, notes 127, 128, *supra*.

²⁷⁷ Part Two, notes 70, 125, *supra*; PROPERTY RESTATEMENT, §373, *Comment C.* (1944).

²⁷⁸ Part Two, note 324 *supra*.

²⁷⁹ Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §§63, 89, 95, 360-362 (1928); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.13 (1952). On this theory, where a power is involved, the instrument exercising

the interest in question will be destructible for a time, the commencement of the period of suspension is postponed to the end of the period of destructibility. If John Stiles conveyed land to James Thorpe upon trust to apply the rents and profits to the use of John for life, then to the use of John's wife for life, then to the use of John's daughters Mary and Lucy for their lives and, on the death of the survivor, to convey to the descendants of John then in being, reserving to the grantor an absolute power of revocation, the trust would be destructible until the death of John and so could not suspend the absolute power of alienation until then.²⁸⁰ Nevertheless, it may be that the fact that John's wife predeceased him could not be considered in determining the validity of the trust. At the time when the deed was delivered it was possible that the trust would suspend the absolute power of alienation for three lives, those of John's wife and his two daughters.

C. TWO LIVES IN BEING

(1) What is a Life in Being?

The statutes did not invalidate an interest which suspended the absolute power of alienation if it was certain when the instrument creating the interest took effect that the suspension could not last longer than the lives of two persons who were in being at that time and designated by or ascertainable from the instrument as the measuring lives.²⁸¹ On the other hand, except in the nar-

the power is read as if it were a part of the instrument creating the power. *Contra*: PROPERTY RESTATEMENT, *App.*, Ch. A, ¶¶14, III. 8; 20; 30 (1944).

²⁸⁰ Part Three, notes 155, 200, *supra*.

²⁸¹ *Paton v. Langley*, 50 Mich. 428, 15 N.W. 537 (1883); *Palms v. Palms*, 68 Mich. 355, 36 N.W. 419 (1888); *Defreese v. Lake*, 109 Mich. 415, 67 N.W. 505 (1896); *Mullreed v. Clark*, 110 Mich. 229, 68 N.W.

row situation to which the restricted minority provision of Section 16²⁸² applied, the statutes did not permit suspension of the absolute power of alienation for any part of a life which was not certainly in being when the instrument creating the interest took effect.²⁸³

In *Palms v. Palms*,²⁸⁴ land was devised to trustees to pay half the income to the testator's son for life and half to the testator's daughter for life. On the death of either, half the principal was to be paid to the children of the deceased child. A subsequent clause directed that the share of any grandchild who was a minor at its parent's death should be held in trust for it during minority. It was suggested that the latter provision was invalid as to

138 (1896); *Torpy v. Betts*, 123 Mich. 239, 81 N.W. 1094 (1900); *Conover v. Hewitt*, 125 Mich. 34, 83 N.W. 1009 (1900); *Sprague v. Moore*, 130 Mich. 92, 89 N.W. 712 (1902); *Van Driele v. Kotvis*, 135 Mich. 181, 97 N.W. 700 (1903); *Cole v. Lee*, 143 Mich. 267, 106 N.W. 855 (1906); *Foster v. Stevens*, 146 Mich. 131, 109 N.W. 265 (1906); *Hull v. Osborn*, 151 Mich. 8, 113 N.W. 784 (1908); *Taylor v. Richards*, 153 Mich. 667, 117 N.W. 208 (1908); *McInerny v. Haase*, 163 Mich. 364, 128 N.W. 215 (1910); *Ward v. Ward*, 163 Mich. 570, 128 N.W. 761 (1910); *Van Gallow v. Brandt*, 168 Mich. 642, 134 N.W. 1018 (1912); *Woolfitt v. Preston*, 203 Mich. 502, 169 N.W. 838 (1918); *Cary v. Toles*, 210 Mich. 30, 177 N.W. 279 (1920); *Young v. Young*, 255 Mich. 173, 237 N.W. 535 (1931); *Van Tyne v. Pratt*, 291 Mich. 626, 289 N.W. 275 (1939); *In re Dingler's Estate*, 319 Mich. 189, 29 N.W. (2d) 108 (1947); *Miller v. Curtiss*, 328 Mich. 239, 43 N.W. (2d) 834 (1950). However, such an interest might be invalid because of some other rule of law. Thus a direct restraint on alienation of an estate in fee simple is void under the common law even though limited in duration to two lives. Part Three, notes 25-31, *supra*. And although a trust of land did not suspend the absolute power of alienation beyond two lives when there was a mandatory direction to convert to personality at or before the expiration of two lives, interests under or following such a trust might violate the common-law Rule Against Perpetuities. Part Three, note 197 *supra*.

²⁸² Rev. Stat. 1846, c. 62, §16, Part Three, note 262 *supra*.

²⁸³ *Wilson v. Odell*, 58 Mich. 533, 25 N.W. 506 (1885); *Palms v. Palms*, 68 Mich. 355, 36 N.W. 419 (1888); *Ford v. Ford*, 80 Mich. 42, 44 N.W. 1057 (1890); *Rozell v. Rozell*, 217 Mich. 324, 186 N.W. 489 (1922); *Burke v. Central Trust Co.*, 258 Mich. 588, 242 N.W. 760 (1932); *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934).

²⁸⁴ 68 Mich. 355, 36 N.W. 419 (1888).

any grandchild who was not in being at the death of the testator. In *Burke v. Central Trust Co.*,²⁸⁵ land was devised to a trustee to pay the rents and profits to various persons. The will provided that the trust should terminate when the youngest of Frank's three living children "or of any child or children hereafter born to my said grandnephew Frank . . . shall attain the full age of twenty-five years," and devised the remainder to the then living children of Frank. As the youngest child of Frank might be a person not in being at the death of the testatrix, its life was not a proper measuring life and hence these provisions were void. In *Gardner v. City National Bank & Trust Co.*,²⁸⁶ land was devised to trustees (1) to pay the income to testator's daughter Alene for life; (2) to pay the income to Alene's named children and any further born children until each child reach twenty-five; (3) to transfer half of its share in the principal to each child of Alene on reaching twenty-five; (4) to pay the income from the remaining half to each such child until it reached thirty and then to transfer the principal to it; (5) if any child of Alene should die before receiving its full share of the principal, to pay the income from its share to its issue during minority, then to transfer such share in the principal to the issue; (6) if any child of Alene should die without issue before receiving its full share of the principal, to add that share to those of the other children; (7) if Alene and all her issue should die prior to the termination of these trusts, to add the principal to that of a like trust set up for testatrix's daughter Natalie and her children. As these provisions might suspend the absolute power of alienation for periods measured by parts of the lives of unborn children of the

²⁸⁵ 258 Mich. 588, 242 N.W. 760 (1932).

²⁸⁶ 267 Mich. 270, 255 N.W. 587 (1934).

daughters and the minority of unborn grandchildren, they were held void.

It would seem that the two measuring lives must be those of human beings; that the lives of corporations, animals, or plants would not serve.²⁸⁷ Although the Michigan statutes were not explicit on the point,²⁸⁸ it appears that a child *en ventre sa mere* at the time the instrument creating an interest became effective was a life in being which could serve as one of the two measuring lives.²⁸⁹ Part of a life in being could be used as a measuring life,²⁹⁰ but, when so used, it was treated as a whole life in computing the number of lives during which suspension might last. Thus a suspension of the absolute power of alienation for three minorities was invalid, although the minors were aged 18, 19 and 20 when the creating instrument took effect.²⁹¹ Although the New York revisers

²⁸⁷ See: *Matter of Howells*, 145 Misc. 557, 260 N.Y. Supp. 598 (1932). Accord, under the common-law Rule Against Perpetuities: Part Two, notes 92, 93, *supra*.

²⁸⁸ Rev. Stat. 1846, c. 62, §§30, 31, Part Three, note 262 *supra*. The New York statutes were amended in 1929 to make it clear that a child *en ventre* is a life in being. REAL PROPERTY LAW, §42; Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.16 (1952).

²⁸⁹ *Chambers v. Shaw*, 52 Mich. 18, 17 N.W. 223 (1883); *Rozell v. Rozell*, 217 Mich. 324, 186 N.W. 489 (1922); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶37, Ch. B, ¶156 (1944).

²⁹⁰ *Paton v. Langley*, 50 Mich. 428, 15 N.W. 537 (1883) (widowhood); *Hull v. Osborn*, 151 Mich. 8, 113 N.W. 784 (1908) (until 45); *Taylor v. Richards*, 153 Mich. 667, 117 N.W. 208 (1908) (until 25 and worthy); Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §§106, 107 (1928); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.16 (1952). Measurement by part of a life in being must be distinguished from measurement by part of a life not in being (Part Three, notes 283-286, *supra*) and from measurement by a period not certain to terminate at or before the expiration of two lives. Thus a period defined as "until my son John reaches 21 or would have reached that age if alive" is a period in gross, not a measurement by part of a life.

²⁹¹ *Hawley v. James*, 16 Wend. 61 (1836); *Benedict v. Webb*, 98 N.Y. 460 (1885); *Matter of Butterfield*, 133 N.Y. 473, *sub nom.* *In re Christie*, 31 N.E. 515 (1892), Part Three, note 137 *supra*; Chaplin,

criticized the use, under the common-law Rule Against Perpetuities, of the lives of persons who take no interest under the conveyance as measuring lives,²⁹² the statutes did not prohibit doing this. Accordingly, it is not essential that the two measuring lives in being be those of persons who take an interest under the instrument in question.²⁹³ The suspension statutes did not limit the number of interests which could be created by an instrument.²⁹⁴ Hence a trust for receipt of the rents and profits of land could have any number of beneficiaries so long as it was certain to terminate at or before the expiration of two lives in being.²⁹⁵ Similarly, a future interest could be limited to any number of persons and could be preceded by any number of interests in any number of persons, so long as it was certain not to suspend the absolute power of alienation for more than two lives in being.²⁹⁶

SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §107 (1928); White-side, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.16 (1952). In *Niles v. Mason*, 126 Mich. 482, 85 N.W. 1100 (1901), "until her death or marriage" was treated as a full life in counting the permissible two. Other Michigan cases on this point will be discussed below in connection with the problem of measurement by the life of the survivor of a group.

²⁹² Extracts from the Original Reports of the Revisers, 3 N.Y. Rev. Stat. (2d ed.) 571 (1836), quoted in the text at Part Three, note 6 *supra*.

²⁹³ *Crooke v. County of Kings*, 97 N.Y. 421 (1884); Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §105 (1928).

²⁹⁴ But see Chapter 19, *supra*, as to the statutory restrictions on successive legal life estates.

²⁹⁵ *Conover v. Hewitt*, 125 Mich. 34, 83 N.W. 1009 (1900); *Sprague v. Moore*, 130 Mich. 92, 89 N.W. 712 (1902); *Foster v. Stevens*, 146 Mich. 131, 109 N.W. 265 (1906); *Ward v. Ward*, 163 Mich. 570, 128 N.W. 761 (1910); *Van Tyne v. Pratt*, 291 Mich. 626, 289 N.W. 275 (1939); *Re Wagar's Estate*, 295 Mich. 463, 295 N.W. 227 (1940); *McGraw v. McGraw*, 176 Fed. 312 (6th Cir. 1910); Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §105 (1928); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶59, Ch. B, ¶56 (1944). A properly measured trust might have unborn beneficiaries. *Gilman v. Reddington*, 24 N.Y. 9 (1861).

²⁹⁶ *Torpy v. Betts*, 123 Mich. 239, 81 N.W. 1094 (1900); *McInerny v. Haase*, 163 Mich. 364, 128 N.W. 215 (1910); *Kemp v. Sutton*, 233

(2) Ascertainment of the Measuring Lives

Under the common-law Rule Against Perpetuities, the measuring lives must be ascertainable from the instrument creating the interest or, in the case of an interest created by the exercise of a power, from the instruments creating and exercising the power.²⁹⁷ That is to say, under the common-law Rule, it must be possible, from the creating instrument and the extrinsic facts which may be considered in determining certainty,²⁹⁸ to ascertain at the time certainty is required²⁹⁹ the identity of the persons whose lives are the measuring lives in being. This is an aspect of the requirement of certainty³⁰⁰ with which the New York revisers must have been familiar and which they probably intended to adopt. Nevertheless, both the New York and Michigan courts relaxed this aspect of the requirement of certainty to some extent. Although it was necessary that the creating instrument or instruments provide some mode of ascertaining the two measuring lives in being which would ensure their identification at or before their own expiration,³⁰¹ it was not essential that the identity of the two persons whose lives were to measure be determinable at the time the creating instrument became effective. It was sufficient if one life was immediately identifiable and the other certainly would be at the expiration of the first.³⁰² Thus the duration of a

Mich. 249, 206 N.W. 366 (1925). But some of the preceding interests might be invalid under the statutes restricting the creation of life estates discussed in Chapter 19, *supra*.

²⁹⁷ Part Two, notes 89-91, *supra*.

²⁹⁸ Part Two, notes 125, 127, 128, Part Three, notes 275, 276, *supra*.

²⁹⁹ Part Two, notes 70, 125, 130, 324, Part Three, notes 271, 277, 278, *supra*.

³⁰⁰ Chapter 11, Section A, and Chapter 21, Section B, *supra*.

³⁰¹ *Everitt v. Everitt*, 29 N.Y. 39 at 72 (1864); Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§95, 97-99 (1928).

³⁰² *Conover v. Hewitt*, 125 Mich. 34, 83 N.W. 1009 (1900) (lives of named person and any wife who survived him); *Van Cott v. Pren-*

testamentary trust could be measured by the life of the testator's widow and that of his youngest child living at the widow's death. Moreover, it was sufficient if each measuring life was certain to be identifiable at or before its own expiration. Thus the duration of a testamentary trust could be measured by the lives of those two of the testator's six children who first died.³⁰³

(3) Life of the Survivor of a Group

If it be accepted that it is sufficient if a measuring life is certain to be identifiable at or before its own expiration, it would seem to follow logically that a suspension of the absolute power of alienation could properly be measured by the life of the survivor of a group of three or more living persons. This would be a single life, certain to be identifiable before its own expiration. Relaxation of the requirement of ascertainability to this extent would, however, make the restriction to two lives virtually inoperative by equating it to the "any number of lives in being" of the common-law Rule. It would make possible the measurement of suspension by the life of the survivor of a group of twenty-eight persons, as was done in an English case³⁰⁴ which had been severely criti-

tice, 104 N.Y. 45, 10 N.E. 257 (1887) (life of settlor and minority of that one of three named persons as should, at the death of the settlor, be the youngest of them living); Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§100, 102 (1928); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶58 (1944). See: *Dean v. Mumford*, 102 Mich. 510 at 515, 61 N.W. 7 (1894).

³⁰³ *Ward v. Ward*, 163 Mich. 570, 128 N.W. 761 (1910) (trust to last for twelve years after the death of the testator "or until the death after my decease and prior to the expiration of said period of twelve years, of two of my children who shall survive me."); *Meldon v. Devlin*, 31 App. Div. 146, 53 N.Y. Supp. 172 (1898), *aff'd.*, 167 N.Y. 573, 60 N.E. 1116 (1901); Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §108 (1928).

³⁰⁴ *Bengough v. Edridge*, 1 Sim. 173, 57 Eng. Rep. 544 (1827), *aff'd.*, *sub nom. Cadell v. Palmer*, 1 Cl. & F. 372, 6 Eng. Rep. 956 (1833).

cized by the New York revisers.³⁰⁵ Hence, illogically but understandably, the New York courts refused to take this step. They have held consistently that measurement by the life of the survivor of a group of more than two persons is not permissible; that it suspends the absolute power of alienation by as many lives as there are persons in the group.³⁰⁶ The Michigan Supreme Court experienced so much difficulty with this problem that a detailed review of the cases involving it is necessary to an understanding of the situation here.³⁰⁷

*Toms v. Williams*³⁰⁸ involved a devise of land to trustees to accumulate part of the rents and profits for the benefit of three named children of the testatrix's deceased brother. When the testatrix died these were aged, respectively, 15, 19, and 21. The will provided,

"I direct my - - - trustees - - -, at the expiration of the minority of the youngest of the said children of my deceased brother, - - - to pay over to said children or the

³⁰⁵ Extracts from the Original Reports of the Revisers, 3 N.Y. Rev. Stat. (2d ed.) 571 (1836), quoted in the text at Part Three, note 6 *supra*. The ideas of the revisers are criticized in 3 Walsh, LAW OF REAL PROPERTY, §347 (1947), where it is pointed out that the lives of two healthy children are likely to last longer than any number of lives of mature persons, and that the life expectancy of two persons is little different from that of ten or more of the same age.

³⁰⁶ *Coster v. Lorillard*, 14 Wend. 265 (1835) (survivor of twelve persons); *Hawley v. James*, 16 Wend. 61 (1836) (until youngest of thirteen minors to reach 21 did so); *Benedict v. Levi*, 177 App. Div. 385, 163 N.Y. Supp. 846 (1917), *aff'd.*, 223 N.Y. 707, 120 N.E. 858 (1918) (survivor of eight persons); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶39 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.16 (1952). The application of this rule is sometimes prevented by the tendency to construe "surviving" as meaning "surviving the testator." Part Two, notes 251, 253-258, *supra*.

³⁰⁷ PROPERTY RESTATEMENT, *App.*, Ch. B, ¶54 (1944); 3 Walsh, LAW OF REAL PROPERTY, §358 (1947); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §§25.16, 25.43 (1952). Professor Whiteside discusses the Michigan cases in some detail. He and the *Restatement* suggest that there is grave doubt as to their effect.

³⁰⁸ 41 Mich. 552, 2 N.W. 814 (1879), Part Two, notes 485, 487, *supra*.

survivors of them, share and share alike, all the net accumulations of my estate, - - -."

A statute then in force provided that an accumulation of rents and profits of real estate "must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority."³⁰⁹ As only two of the children were minors when the testatrix died, the quoted provision could not, on any possible construction of the statutes, have suspended the absolute power of alienation for longer than two lives in being, so the only question presented was the effect of the accumulation statutes. The trial court held that the accumulation for each child should terminate when it reached 21 and, as this ruling was not appealed, it was not disturbed, but the Supreme Court, after holding that "survivors" meant those who survived the testatrix, said,

"But we do not feel at all satisfied that the statute requires such a construction. Its language certainly is quite consistent with an accumulation for any number of infants until all come of age, and such an accumulation is really no more than for the minority of a single life in being."³¹⁰

This passage related only to the accumulation statute and had nothing to do with the two lives provisions of the suspension statutes, but the last clause reflects a mode of thought which is out of harmony with the New York decisions under the suspension statutes.

*Dean v. Mumford*³¹¹ involved a will which gave the testator's widow the life use of his homestead and directed his executors to pay taxes and repairs and to pay her a

³⁰⁹ Rev. Stat. 1846, c. 62, §37, Part Two, note 482 *supra*.

³¹⁰ 41 Mich. 552 at 569. Per Campbell, C.J. Accord, as to the meaning of the accumulation statute, *Wilson v. Odell*, 58 Mich. 533, 25 N.W. 506 (1885).

³¹¹ 102 Mich. 510, 61 N.W. 7 (1894).

life annuity. A succeeding clause directed division of the residue among five children. A later clause directed that the shares of three sons be held in trust for the sons, their wives and children, "during the lives of my said sons, and their wives, and upon the decease of said sons and their wives, the portion so held in trust by my said executors shall become the property of and go to the child or children of said sons, severally." It was held that the first provision created a trust for the life of the widow which suspended the absolute power of alienation during her life, and that the last clause mentioned created three separate trusts, each of which was to be judged, as to validity, separately, and each of which suspended the absolute power of alienation for the lives of a son and his wife. The court held the three trusts void because, in combination with the trust for the widow, each suspended the absolute power of alienation for three lives, those of the widow, a son and his wife. This decision appears to accept the New York interpretation of the suspension statutes on the point under consideration.

In *Trufant v. Nunneley*,³¹² a testator devised the use of two described farms to his son John for life, the use of two smaller farms to his daughter Julia for life, and the use of farms of equal value to those of Julia to his daughter Alice for life. Subject to these life estates, all of the farms were devised "to the body heirs of my said son and daughters, share and share alike." The will further provided that if any child should die without issue before testator's widow, the land devised to that child for life should pass to the widow for life, with remainder to the body heirs of the children, if any, otherwise to the heirs of the wife. A decree holding these dispositions valid was reversed with an opinion which stated,

³¹² 106 Mich. 554, 64 N.W. 469 (1895).

"In any view of the case, we are satisfied that the will cannot be sustained as to these three parcels of land. The conditions of this will are such that there is no one who can convey so as to cut off future rights of as yet unascertained persons; for, until the death of testator's three children, it cannot be ascertained who are the body heirs of these three persons. Complainant's body heirs cannot be ascertained until his death, and so with the body heirs of the daughters. So the estate in these lands is tied up during the life of the son and two daughters, making three lives, and then the remainder over is to the body heirs of all the children of the testator. Until all these contingencies happen, there is no person or persons in whom the estate can vest in fee simple absolute, and hence no person in being who could convey. Chapl. Suspen. §127; *Kilpatrick v. Barron*, 54 Hun, 322; *Graham v. Fountain*, 2 N.Y. Supp. 598. It follows that the will must be held void as affecting the pieces of land described, and, as to the remainder in them, they must be distributed under the statute." ³¹³

In *Niles v. Mason*, ³¹⁴ a testator devised his entire estate to trustees (1) to pay Sarah Niles \$12.50 a month until her death or marriage; (2) subject thereto, to pay half the income to Charles Niles for life and the other half to Lottie Niles for life; (3) upon the death of Charles or Lottie to pay half the principal to the children of the deceased; (4) if Charles or Lottie die without surviving issue, to pay the entire income to the other for life and the

³¹³ 106 Mich. 554 at 560-561. *Kilpatrick v. Barron*, 54 Hun. 322 (1889), *aff'd.*, 125 N.Y. 751, 26 N.E. 925 (1891) and *Graham v. Fountain*, 2 N.Y. Supp. 598 (1888), cited by the Court, did not involve suspension of the absolute power of alienation beyond two lives. These cases held merely that a future interest limited to a class which might include unborn persons could not be cut off by persons in being.

³¹⁴ 126 Mich. 482, 85 N.W. 1100 (1901). As pointed out above (Part Three, note 228 *supra*), this will would have been fully valid in New York because the annuity of Sarah was a charge on principal, alienable, and did not suspend the absolute power of alienation for her life. Hence, under the New York analysis, there was suspension only for the lives of Charles and Lottie.

entire principal to his children at death; (5) if both Charles and Lottie die without surviving issue, remainder to Charles Niles in fee. It was held that these dispositions suspended the absolute power of alienation for three lives, those of Sarah, Charles, and Lottie, and that, except as to the annuity of Sarah, they were void.

In *Foster v. Stevens*,³¹⁵ land was devised to trustees to pay the rents, profits and income to the testator's widow and two sons "during their natural lives and the natural life of either of them." A later clause directed that, upon the death of the sons, the land should descend to their heirs. The Court assumed that, if the trust was to last for the life of the survivor of the widow and sons, it would suspend the absolute power of alienation for three lives but construed the will as providing that the trust should cease upon the death of the survivor of the sons, even if the widow was still alive. As so construed the trust was, of course, valid.

In *Root v. Snyder*,³¹⁶ Root conveyed land to Frantz as trustee to convey to Root, Susan Snyder, Jared Snyder, and Flora Snyder, "as joint tenants and to their heirs and assigns, and to the survivors or survivor of them, and the heirs and assigns of the survivors or survivor of them," which Frantz did by a deed which contained the same language in the granting clause but the habendum of which was, "to them as joint tenants and not as tenants in common, and to their heirs and assigns forever." Sub-

³¹⁵ 146 Mich. 131, 109 N.W. 265 (1906). The Court cited *People's Trust Co. v. Flynn*, 106 App. Div. 78, 94 N.Y. Supp. 436 (1905), which reached a contrary result on the construction problem, but sought to distinguish it on the ground that the Foster will made other provision for the widow. Mrs. Foster died before the litigation was commenced by one of the sons against the other and the trustee.

³¹⁶ 161 Mich. 200, 126 N.W. 206 (1910). Compare *Trufant v. Nunneley*, 106 Mich. 554, 64 N.W. 469 (1895), Part Three, note 312 *supra*.

sequently Root sued to set aside these deeds on the ground, *inter alia*, that they limited interests to the heirs of the survivor of four persons and so suspended the absolute power of alienation for four lives. The Court rejected this contention, holding that the deeds created an ordinary joint tenancy in fee; that the heirs of the survivor took by descent and not by purchase. This being so, the entire title was held by four living persons and there was no suspension of the absolute power of alienation.³¹⁷

*Truitt v. City of Battle Creek*³¹⁸ involved a series of conveyances of land. On April 13, 1903, Robertson, who owned in fee, executed a life lease to Beauregard and wife. On the same day Robertson conveyed the fee, subject to the Beauregard lease, to Melbourne Truitt, and Truitt and the Beauregards joined in a mortgage of the fee to Welch. On July 24, 1903, Melbourne Truitt conveyed the fee, subject to the Beauregard lease, to Louise Truitt. On the following day Louise Truitt conveyed to Melbourne Truitt for life, remainder to his heirs. The Welch mortgage was foreclosed and the land purchased at foreclosure sale by Onen, who conveyed the fee to Melbourne Truitt in 1910. Louise Truitt then quit-

³¹⁷ After this decision, Susan and Jared Snyder died, Root conveyed an undivided half of the land to Jones, Root died, and Jones sued Flora Snyder for partition. The Court then held that the deeds created a joint tenancy for life, with a contingent remainder to the survivor in fee which could not be cut off by Root's conveyance. Hence Flora Snyder acquired the entire fee on the death of Root. *Jones v. Snyder*, 218 Mich. 446, 188 N.W. 505 (1922). Although this construction was inconsistent with that made in *Root v. Snyder*, it did not involve suspension of the absolute power of alienation because, under it, the entire fee was held by four living persons who could, acting together, convey an absolute fee in possession. On the construction problem see Part One, note 167 *supra*, and Danahey, "The Confusing Right of Survivorship," 32 MICH. ST. BAR J.L. 14-17 (Feb. 1953).

³¹⁸ 205 Mich. 180, 171 N.W. 338 (1919), overruled on rehearing, 208 Mich. 618, 175 N.W. 578 (1920), Part Three, note 60 *supra*.

claimed in fee to Melbourne Truitt, and Melbourne brought a suit to quiet title against his own unknown heirs. The plaintiff conceding that, if he was a life tenant before the mortgage foreclosure, his purchase of the title acquired by the foreclosure would not cut off the remaindermen, contended that the deed of July 25, 1903, was void because it violated the suspension statutes and the statute prohibiting more than two successive life estates.³¹⁹ On the original hearing the Supreme Court reversed a decree for the plaintiff, saying,

"The crucial question therefore in the instant case is, Did the life lease to Oliver Beauregard and Thersil, his wife, create an estate for two lives in being, two life estates, or but one? Was its duration measured by two lives or by only one, that of the survivor? That the estate created was an estate by entirety has been frequently held by this court - - -. Each is a tenant by the entirety, and the survivor takes the whole estate. The duration of the estate is measured by the life of the survivor. It is neither shortened nor lengthened by the death of one of the parties. It is terminated only by the death of the survivor. Obviously, therefore, the estate created is an estate for one life, viz., that of the survivor. See *Woolfit v. Preston*, 203 Mich. 502." ³²⁰

On rehearing, the original decision was vacated and the decree of the trial court quieting title in the plaintiff

³¹⁹ Rev. Stat. 1846, c. 62, §17, Part Three, notes 1, 53, *supra*.

³²⁰ 205 Mich. 180 at 183-184. In *Woolfitt v. Preston*, 203 Mich. 502, 169 N.W. 838 (1918), Part Three, note 57 *supra*, land was devised to Claudia for life, remainder to Martha and Florence for life, remainder to Helen and Ruth in fee. It was held that this was a valid disposition of an undivided half to Claudia for life, remainder to Martha for life, remainder to Helen and Ruth in fee, and of the other undivided half to Claudia for life, remainder to Florence for life, remainder to Helen and Ruth in fee; that is, that the life estates of Martha and Florence were in separate shares. The Court was careful to hold explicitly that the survivor of Martha and Florence would take no interest in the share of the other.

in fee affirmed on the ground that the deed of July 25, 1903, had never been accepted, the court saying,

"The conclusion we have reached makes it unnecessary to determine the effect of the life estate given to Oliver Beauregard and wife Thersil. The determination of that question being unnecessary, what was said in the original opinion on that subject may be considered withdrawn, and the case will be disposed of on another theory."³²¹

Despite the express withdrawal of the quoted language of the original opinion, its presence in the Reports introduces disturbing elements of confusion into the law. As the Court evidently failed to see, the interests involved could not possibly have suspended the absolute power of alienation for longer than the life of Melbourne Truitt. As none of them was subject to a trust, at Melbourne's death his heirs would certainly be ascertainable and able to combine with the Beauregards and the mortgagee to convey an absolute fee in possession. Hence the only problem presented was whether a conveyance to two persons for the life of the survivor creates a single life estate or two successive life estates within the meaning of the statute prohibiting more than two. It was already settled in Michigan that such a conveyance creates a single life estate.³²² The statement that such an estate is one for a single *life* has nothing to do with the question whether there was a single *estate* or two and so was wholly unnecessary to the decision, even on the theory of the original opinion. Even more disturbing than this confusion of two separate questions is the suggestion implicit in the original opinion that when the absolute power of

³²¹ 208 Mich. 618 at 619. Both opinions were by Fellows, J.

³²² Case v. Green, 78 Mich. 540, 44 N.W. 578 (1889), Part Three, note 59 *supra*.

alienation of a tract of land is suspended by each of several distinct and separate conveyances, the periods of suspension effected by each are to be added together and invalidity found if the aggregate of these periods exceeds the permissible statutory period. The New York decisions clearly negative this suggestion. They hold that the statutory period limits only suspension created by a single transaction. For example, if an owner in fee creates a trust which suspends the absolute power of alienation for two lives, retaining the reversion, he may at a later time, as a separate transaction, create another trust of the reversion for two other lives then in being.³²³

*Grand Rapids Trust Co. v. Herbst*³²⁴ involved a will which (1) directed payment of \$75 a month each to two nephews and a niece during their lives; (2) directed division of the remainder of the net income among a son, a brother, and two sisters in equal shares; (3) devised to the son, when and if he reached 25, half the estate outright and the other half charged with payment of the \$75 a month to each nephew and niece and the remainder of the net income therefrom to the brothers and sisters and the survivor of them during life; (4) if the son died under 25 leaving issue, devised half the estate to trustees to apply principal and income to the support of the issue until 21 or earlier death; principal to the issue at 21; (5) if the son died under 25 without issue or with issue which

³²³ *New York Life Insurance & Trust Co. v. Cary*, 191 N.Y. 33, 83 N.E. 598 (1908); Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §139 (1928). Of course, the exercise of a power of appointment created by the original transaction is not a separate transaction. *Genet v. Hunt*, 113 N.Y. 158, 21 N.E. 91 (1889).

³²⁴ 220 Mich. 321, 190 N.W. 250 (1922), Part Three, note 245 *supra*. Cf. *Burke v. Central Trust Co.*, 258 Mich. 588, 242 N.W. 760 (1932), Part Three, notes 248, 285, *supra*; *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934), Part Three, note 286 *supra*, in both of which the facts were similar and the result the same.

failed to reach 21, devised the entire estate to four named charitable institutions, subject to the payments specified in (3). Provision (4) was probably invalid, insofar as it purported to create a trust for receipt of the rents and profits of lands to last during the minority of unborn persons.³²⁵ It had, however, been held in *Palms v. Palms*³²⁶ that the invalidity of such a provision did not invalidate other dispositions made by the same will. The Court decided that provisions (1), (2), and (3) created a trust for receipt of the rents and profits of lands to last until the death of the survivor of the son, brother, sisters, nephews, and niece, and held that such a trust was void because it was to last for seven lives. Although this case was complicated by the interests of the unborn issue of the son, the decision, like those in *Dean v. Mumford*,³²⁷ *Trufant v. Nunneley*,³²⁸ *Niles v. Mason*,³²⁹ *Foster v. Stevens*,³³⁰ and *Root v. Snyder*,³³¹ appears to be based on the New York theory that a suspension of the absolute power of alienation for the life of the survivor of a group of persons is a suspension for as many lives as there are persons in the group.³³²

In *Allen v. Merrill*,³³³ a testator devised the residue of his estate to trustees (1) to pay out of income \$1,000 per year to his wife for life and the balance to his wife and five children in equal shares; (2) if any child die, his children to receive the income otherwise payable to him,

³²⁵ Part Three, note 283 *supra*. But see Part Three, notes 369, 370, *infra*.

³²⁶ 68 Mich. 355, 36 N.W. 419 (1888), Part Two, note 561 *supra*.

³²⁷ Part Three, note 311 *supra*.

³²⁸ Part Three, note 312 *supra*.

³²⁹ Part Three, note 314 *supra*.

³³⁰ Part Three, note 315 *supra*.

³³¹ Part Three, note 316 *supra*.

³³² Part Three, note 306 *supra*.

³³³ 223 Mich. 467, 194 N.W. 131 (1923).

or, if none, the other children of the testator; (3) on the death of the wife, principal to be distributed to the five children, share of any child pre-deceasing the wife to go to its issue, if any, otherwise to the surviving children of the testator; (4) if the wife predecease the testator or elect to take against the will, trustees to distribute within five years after the testator's death as provided in (3). The wife elected to take against the will. Ten years after the testator's death, a creditor of one of his children attached the trust land, and the trustees sued to remove the attachment as a cloud on title. A decree for the plaintiffs was affirmed in an opinion which rejected the contention of the creditor that the trust was void because it suspended the absolute power of alienation beyond two lives in being. In this connection the Court said,

"Under the will the trustees hold the legal estate, for they have power to convey and thereby cut off the equitable estates or interests of the designated beneficiaries. Such holding by the trustees, coupled with the duty, in case of sale, to bring the avails to the administration of the trust, suspends in law the power of alienation. And this brings us to the pivotal question of whether this suspension goes beyond two lives in being.

"If the widow elected to take under the statute, then the will directed the estate to be settled in five years after testator's death, by distribution, first, to his children then living (one life in being); second, in case of death of any of his children, with issue, then to such issue by right of representation (two lives in being), and if no issue, then to his surviving children. The distributees, so designated, were all in being at the death of testator. The trust was a valid one." ³³⁴

The meaning of this passage is obscure. As the trustee was empowered to terminate the trust by distribution at

³³⁴ 223 Mich. 467 at 471-472. Per Wiest, C.J.

any time after the death of the widow or her earlier election to take against the will, neither the trust nor interests under it could suspend the absolute power of alienation for longer than the life of the widow.³³⁵ If this were not so, the trust would be void because it might last for a gross term of five years, unconnected with measuring lives, and the class of distributees might include persons who came into being at any time within five years after the death of the testator.³³⁶ The quoted passage has sometimes been thought to state that suspension of the absolute power of alienation may be measured by the life of the survivor of a group of more than two persons on the theory that that would be one life.³³⁷ If this be its meaning, the language is not pertinent to the facts, because the trust involved in the case was not measured by lives at all but by a term in gross.

*Kemp v. Sutton*³³⁸ involved a devise of land to the testator's widow and three sons and the survivors and survivor of them, remainder on the death of the survivor to the City of Sault Ste. Marie. The Court correctly held that the will created no trust and that, because all in-

³³⁵ Part Three, notes 185, 200, *supra*.

³³⁶ The quoted passage appears to construe "surviving" as meaning "surviving the testator." See Part Two, notes 251, 253-258, *supra*. Actually, it probably meant "surviving to a time when the trustees are authorized to distribute," which would be (1) the death of the testator if his wife predeceased him, (2) the death of his widow, or (3) the widow's election to take against the will. On either of these constructions, the distributees of both income and principal would all be in being and ascertained within a life in being at the testator's death. If, however, "surviving" meant "surviving until actual distribution," the class of distributees might include persons who came into being at any time within five years after the testator died. A limitation to such a class would, in the absence of destructibility, be void even if the trust itself did not suspend the absolute power of alienation beyond the widow's life. Part Three, note 78 *supra*.

³³⁷ PROPERTY RESTATEMENT, *App.*, Ch. B, ¶54, note 216 (1944), Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.43, note 7 (1952).

³³⁸ 233 Mich. 249, 206 N.W. 366 (1925), Part Three, note 61 *supra*.

terests in the land were limited to ascertained persons in being, there was no suspension of the absolute power of alienation whatever. The only problem involved was whether there was a violation of the statute prohibiting more than two successive legal life estates.³³⁹ Consistently with previous decisions,³⁴⁰ the Court held that a joint estate for the life of the survivor of several persons is a single estate, not several successive life estates. In reaching this conclusion, however, the Court used language which has sometimes been misunderstood to state that the life of the survivor of a group of persons is a single life for purposes of the suspension statutes. It said,

"The life tenants are joint holders. They count as a class and in the eye of the law as one life in being. . . . As was said in *Smith's Appeal*, 88 Pa. St. 492:

'It matters not how many lives there may be so that the candles are all burning at the same time, for the life of the longest liver is but a single life.'

"See 2 Alexander on Wills, §1158. Such rule was announced upward of two and a half centuries ago. See 1 Siderfin, 451."³⁴¹

In *Felt v. Methodist Educational Advance*,³⁴² a testator devised a farm to his widow for life, remainder to his three children,

³³⁹ Rev. State. 1846, c. 62, §17, Part Three, notes 1, 53, *supra*. This was true also in *Truitt v. City of Battle Creek*, Part Three, note 318 *supra*.

³⁴⁰ *Case v. Green*, 78 Mich. 540, 44 N.W. 578 (1889); Part Three, note 59 *supra*; *Truitt v. City of Battle Creek*, 205 Mich. 180, 171 N.W. 338 (1919), reversed on other grounds, 208 Mich. 618, 175 N.W. 578 (1920), Part Three, notes 60, 318, *supra*; *Jones v. Snyder*, 218 Mich. 446, 188 N.W. 505 (1922), Part Three, notes 61, 317, *supra*.

³⁴¹ 233 Mich. 249 at 257, 260. Per Wiest, J. As the question at issue was not whether there were one or more lives but whether there were successive life estates, it is unfortunate that the court chose to discuss the problem of whether a period measured by the life of the survivor of a group is one or several lives and to cite authorities relating to the permissible period of suspension of vesting under the common-law Rule Against Perpetuities.

³⁴² 247 Mich. 168, 225 N.W. 545 (1929), Part Three, note 62 *supra*.

“to have and to hold the same to the said Joseph Elwell, George W. Elwell and Rhody Conant for and during the term of their natural lives, - - - the same to be equally divided among them if requested by all or either of them; and from and immediately after the decease of the said Joseph Elwell, George W. Elwell and Rhody Conant, or either of them, the share set off to such deceased heir, I give, devise and bequeath to the heirs of said deceased heir, for him, her or them and their heirs and assigns forever.”

The ultimate remainders were held valid in an opinion stating, “Our later cases hold that the devise of a life estate to a class collectively creates an estate for one life only, that of the ‘longest liver’ of the class, and is to be so taken in determining the period of suspension of power of alienation.”³⁴³ Although the decision was perfectly sound, this statement was inaccurate and unnecessary. There were two questions presented, (1) whether the devise created more than two successive legal life estates, and (2) whether the remainder interests of the heirs of the life tenants suspended the absolute power of alienation for more than two lives. There was no “devise of a life estate to a class collectively;” what was involved was a devise of separate life estates in distinct shares, without cross-remainders. As to each third of the farm, there was a life estate in the widow, a second successive life estate in a child, and a remainder in fee to the heirs of that child. Thus as to any share there were only two successive life estates and suspension of the absolute power of

³⁴³ 247 Mich. 168 at 171, citing *Woolfitt v. Preston*, 203 Mich. 502, 169 N.W. 838 (1918), Part Three, notes 57, 320, *supra*, *Truitt v. City of Battle Creek*, 205 Mich. 180, 171 N.W. 338 (1919), Part Three, notes 60, 318, *supra*, and *Kemp v. Sutton*, Part Three, note 338 *supra*. *Woolfitt v. Preston* disposed of virtually the same problem on the theory suggested in the text as correct.

alienation for one life, that of the child who was life tenant in remainder.

*Bateson v. Bateson*³⁴⁴ was a suit by the settlor to set aside a deed on the ground that the trust created thereby suspended the absolute power of alienation for more than two lives. The deed conveyed land to a trustee (1) to pay the net income to the settlor for life; (2) on the death of the settlor to transfer an undivided 4/10 of the principal to the settlor's son George or, if George was then dead, to George's wife Jennie and son George, Jr. or the survivor of them; (3) after the death of the grantor to hold an undivided 4/10 of the principal in trust, pay the net income therefrom to the settlor's son Samuel for life and, on the death of Samuel, to transfer this 4/10 of the principal to Samuel's wife Hattie and daughters Harriet and Dorothy, or the survivors or survivor of them; (4) after the death of the settlor to hold an undivided 2/10 of the principal in trust, pay the net income to the settlor's grandson James for fifteen years, computed from the death of the settlor, and, at the expiration of that period, to transfer this 2/10 of the principal to James, but if James should die within the fifteen years, to transfer this 2/10 of the principal to the wife and children of James or the survivors of them. The deed provided that if James should die within the fifteen years without surviving wife or children, the trustees should transfer half of this 2/10 of the principal to George and retain the other half in the trust for Samuel. The majority opinion, written by Mr. Justice Wiest, the author of the opinions in *Allen v. Merrill*³⁴⁵ and *Kemp v. Sutton*,³⁴⁶ stated,

"The trust deed grant of the 2/10 interest suspended

³⁴⁴ 294 Mich. 426, 293 N.W. 705 (1940), Part Three, note 260 *supra*.

³⁴⁵ Part Three, notes 333, 334, *supra*.

³⁴⁶ Part Three, notes 338, 341, *supra*.

the power of alienation during the lifetime of the grantor and for 15 years thereafter. The grantor is still living. Upon execution of the deed there were no persons in being by whom an absolute fee in possession could be conveyed. Contingent, subsequent vesting of the title upon expiration of the stated period of suspension, dependent upon future and unpredictable events, leaves the title beyond disposition by persons in being by whom an absolute fee in possession could be conveyed and renders the grant of the 2/10 interest void under the statute. 3 Comp. Laws 1929, §§12934, 12935 (Stat. Ann. §§26.14, 26.15)

"This brings to consideration the question of whether the void grant invalidates all the grants. Courts in construing trust deed grants make no fine distinction between such and testamentary trust devises for the ultimate determinative factors in either instance run along like lines and are accorded like consideration.

"To carry out the directions of the grantor the attorney who prepared the deed of trust had to treat each grant separately for they were unlike in purpose and scope. Each was separate and consequently severable and the valid grants are in no way dependent upon operation of the one found invalid. The intention of the grantor at the time of the execution of the deed of trust governs, and it is clear that he then considered each grant by itself and imposed conditions relative to contingent devolution not to a class but to persons specifically designated. True, the three grants were in one instrument, but that is of no particular importance upon the question of severability. Under the evidence bearing upon the grantor's intention at the time of the execution of the deed and expressed in the terms of that instrument we must hold the grants separate and independent and the void one falls alone.

"The general principle is stated in Chaplin on Suspension of the Power of Alienation (3rd ed.), §528, as follows:

"Where an instrument contains dispositions some of

which are void for undue suspension, or postponement of vesting, it does not necessarily follow that all parts of the scheme are thereby destroyed. For a distinction is to be observed between schemes which were obviously intended to constitute a single entity and must stand or fall on their merits as one whole, and those which may be separated into wholly independent dispositions. If a provision of the former character involves an unlawful suspension or postponement, the whole scheme falls to the ground, while if the taint of illegality attaches only to a wholly independent part of an entire scheme, this illegal part may be cut off, and the rest allowed to stand.' "

"And also sections 529 and 530 reading:

" 'The fact that valid and void limitations are both embraced within the terms of a single trust, does not constitute any insuperable obstacle in the way of sustaining the former while cutting off the latter.

" 'And where an estate is vested in a trustee upon several independent and separable trusts, some of which are legal, while others are in contravention of the statute concerning suspension, the estate of the trustee may, in accordance with the principles above stated, be upheld to the extent necessary to enable him to execute the valid trusts.' "

"We hold the trust deed valid, except as to the 2/10 interest mentioned. The devise of the mentioned 2/10 interest was 'void in its creation' and title thereto remained vested in plaintiff." ³⁴⁷

Three justices dissented in part in an opinion stating,

"First, it should be noted that the mere inclusion of the 15-year limitation incident to this trust provision does not render it invalid, because wholly independent of that limitation the period of suspension is measured by two lives in being—i.e., the life of plaintiff and that of his grandson. - - -

³⁴⁷ 294 Mich. 426 at 431, 432-433. These parts of the opinion, other than the first paragraph quoted, are set out here because they are a sound and valuable discussion of the problem of separability.

"Nor am I in accord with that portion of my Brother's opinion wherein he holds that 2/10ths interest in the corpus of the trust provision for the grandson is void *in toto*. Instead, the provision as to the one-half of this 2/10ths which upon the death of the grandson will forthwith vest in fee in defendant George Bateson (or in the surviving wife and children, if any, of the grandson), is valid because it does not suspend the power of alienation beyond two lives in being."³⁴⁸

The minority was correct in stating that the trust for the grandson James did not suspend the absolute power of alienation for fifteen years in gross. It was bound to terminate at or before the death of James. But the minority view that the limitation of the 1/10 which might, on the death of James, be continued in trust for the life of Samuel, was void follows the New York theory that a trust to last for the life of the survivor of three persons suspends the absolute power of alienation for three lives and so is void.

*In re Wagar's Estate*³⁴⁹ involved a will which devised land to a trustee to pay the income to the testator's widow for life and after her death to pay fixed annuities from the rents and earnings to three named children and four named grandchildren, or the heirs of any who died, until the death of the survivor of the three children. The only question raised in the litigation was whether the widow of one of the children was an heir for this purpose. The parties did not attack the validity of the provision, and the Court decided the question presented in favor of the widow without considering the validity of the trust. It is possible that this is, in effect, a decision

³⁴⁸ 294 Mich. 426 at 433-435. A justice having died, the Court had only seven members.

³⁴⁹ 295 Mich. 463, 295 N.W. 227 (1940), Part Three, notes 249, 255, *supra*.

that the duration of a trust for receipt of the rents and profits of land may be measured by the life of the survivor of a group of four persons. It may, however, constitute a ruling that the annuities involved were alienable and so did not suspend the absolute power of alienation.³⁵⁰ What is more likely than either of these hypotheses is that the validity of the trust was already *res judicata* because of failure to appeal from the original probate order of distribution.³⁵¹ If this is the case, the decision has no value whatever as a precedent on the question under consideration.

In *Dodge v. Detroit Trust Company*,³⁵² the residue of an estate was devised to trustees to form a corporation, transfer the property to it in exchange for its stock, and hold the stock in trust until the death of the survivor of four named persons. The interested parties entered into a settlement agreement under a statute authorizing such settlements. Later one of them sued to set aside this agreement. Counsel for the defendants argued that, under the language in *Kemp v. Sutton*³⁵³ and *Felt v. Methodist Educational Advance*,³⁵⁴ the life of the survivor of four persons is one life which might be used to measure the duration of a trust under the suspension statutes. The Court found it unnecessary to pass upon this contention, suggesting that the validity of the trust was sufficiently doubtful to warrant a settlement agreement.

It thus appears that, although there are dicta in five opinions which seem to suggest that measurement of

³⁵⁰ Part Three, note 255 *supra*.

³⁵¹ *Snyder v. Potter*, 328 Mich. 236, 43 N.W. (2d) 922 (1950).

³⁵² 300 Mich. 575, 2 N.W. (2d) 509 (1942). For the statute authorizing such settlement agreements, see Part One, note 648 *supra*.

³⁵³ Part Three, notes 338, 341, *supra*.

³⁵⁴ Part Three, notes 342, 343, *supra*.

suspension of the absolute power of alienation by the life of the survivor of a group of persons is measurement by one life, none of the cases in which these opinions were rendered actually involved the problem.³⁵⁵ In every case where the problem was really involved the Michigan Supreme Court acted on the theory of the New York courts that suspension for the life of the survivor of a group of persons is for as many lives as there are persons in the group.³⁵⁶ What the Court will do in cases which arise in the future remains to be seen, but it would be hazardous to rely on its departing from the New York theory in cases involving the suspension statutes, as distinguished from the statutes restricting accumulations and successive life estates.

(4) Separability

As was seen in Chapter 17, under both the common-law Rule Against Perpetuities and the statutes restricting suspension of the absolute power of alienation, when one interest created by an instrument is void because it may effect a suspension for too long a period, other interests created by the same instrument may be valid if they are separable from the void provision.³⁵⁷ Where, as in New

³⁵⁵ *Toms v. Williams*, Part Three, note 308 *supra*; *Truitt v. City of Battle Creek*, Part Three, note 318 *supra*; *Allen v. Merrill*, Part Three, note 333 *supra*; *Kemp v. Sutton*, Part Three, note 338 *supra*; *Felt v. Methodist Educational Advance*, Part Three, note 342 *supra*. Cf. *Dodge v. Detroit Trust Co.*, Part Three, note 352, *supra*.

³⁵⁶ *Dean v. Mumford*, Part Three, note 311 *supra*; *Trufant v. Nunneley*, Part Three, note 312 *supra*; *Niles v. Mason*, Part Three, note 314 *supra*; *Foster v. Stevens*, Part Three, note 315 *supra*; *Root v. Snyder*, Part Three, note 316 *supra*; *Grand Rapids Trust Co. v. Herbst*, Part Three, note 324 *supra*; *Bateson v. Bateson*, Part Three, note 344 *supra*. Cf. *In re Wagar's Estate*, Part Three, note 349 *supra*.

³⁵⁷ Part Two at notes 529-572, *supra*, and see the discussion of this point in the opinion in *Bateson v. Bateson*, Part Three, note 344 *supra*, quoted in the text at Part Three, note 347 *supra*.

York, the period of suspension is restricted to two lives in being and suspension for the life of the survivor of a group of more than two persons is not permitted,³⁵⁸ the doctrine of separability attains a new importance because in some situations, although all the interests violate the statutes if they are not separable, all may be valid if they are. If John Stiles devises land to a trustee to apply the rents and profits to the use of John's widow for life and then to the use of his five children for the life of the survivor, the trust suspends the absolute power of alienation for six lives and is wholly void under the New York and, at least the earlier, Michigan decisions. If, however, John Stiles devises land to a trustee to apply the rents and profits to the use of his widow for life and on her death to divide the principal into five shares and hold each on trust for the life of one of John's children, the trusts for the children are separable and all are valid.³⁵⁹ As to each share, the absolute power of alienation is suspended for only two lives, those of the widow and one child. The New York courts have developed the doctrine of separability elaborately and, by means of it, have saved many dispositions which otherwise would have failed.³⁶⁰ Although there are fewer cases here, Michigan recognizes the doctrine.³⁶¹ If, as sug-

³⁵⁸ Part Three, note 306 *supra*.

³⁵⁹ *Wells v. Wells*, 88 N.Y. 323 (1882); *Vanderpoel v. Loew*, 112 N.Y. 167, 19 N.E. 481 (1889); *Oliver v. Wells*, 254 N.Y. 451, 173 N.E. 676 (1930); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶43 (1944).

³⁶⁰ *Chaplin*, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§140-151 (1928); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶¶33, 39-52 (1944); *Whiteside*, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §§25.24-25.27 (1952).

³⁶¹ *Dean v. Mumford*, 102 Mich. 510, 61 N.W. 7 (1894), Part Three, note 311 *supra*; *Mullreed v. Clark*, 110 Mich. 229, 68 N.W. 138 (1896) (devise to wife for life, remainder to James in fee but if James die without issue, to Mary and Jane in fee and if either Mary or Jane die without heirs, her share to Elizabeth in fee. The wife predeceased the testator, and the shares of Mary and Jane were treated as

gested in the preceding paragraph, Michigan still follows the New York rule that the absolute power of alienation may not be suspended for the life of the survivor of a group of more than two persons, the doctrine of separability may yet be used here to validate all of the provisions of an instrument which would, in its absence, be wholly void.

D. THE RESTRICTED MINORITY PROVISION

Under the common-law Rule Against Perpetuities, vesting may be suspended during the minority of a person who is not in being at the commencement of the period but is certain to come into being, if ever, within designated lives in being.³⁶² The suspension statutes permitted suspension of the absolute power of alienation beyond two designated lives in being at the time the creating instrument took effect in only one narrow situation. Section 16 of Chapter 62 of the Revised Statutes of 1846 provided,

"A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any contingency by which the estate of such persons may be determined before they attain their full age."³⁶³

separable.); *Woolfitt v. Preston*, 203 Mich. 502, 169 N.W. 838 (1918), Part Three, note 320 *supra*. See: *Blossom v. Anketell*, 275 Fed. 947 (D.C.E.D. Mich. 1921). Cf. *Niles v. Mason*, 126 Mich. 482, 85 N.W. 1100 (1901), Part Three, note 314 *supra*; *Felt v. Methodist Educational Advance*, 247 Mich. 168, 225 N.W. 545 (1929), Part Three, note 342 *supra*, where the doctrine should have been applied but the limitations were held valid on another theory; *Michigan Trust Co. v. Baker*, 226 Mich. 72, 196 N.W. 976 (1924), Part Two, note 547 *supra*. See: Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.44 (1952).

³⁶² Part Two, notes 31, 101, 110, *supra*.

³⁶³ Part Three, note 262 *supra*. The comments of the New York revisers on this section are set out in the text at Part Three, note 6 *supra*.

The extended suspension permitted by this section appears to be that effected by the second remainder in fee and to be permitted only when the person whose minority is to serve as its measure is himself certain to come into being within the statutory period and when a fee in remainder is first limited to him.³⁶⁴ It should be noted that the provision is not limited to situations where the person whose minority is to measure the extended term is not in being when the creating instrument takes effect. That is, it permits suspension for two and a fraction lives in being or for two lives in being plus the minority of a person not in being.³⁶⁵

In *Van Gallow v. Brandt*,³⁶⁶ land was devised to the testator's sister Mary in fee. The will provided,

"In case my said sister - - - should die before her husband, I hereby give, bequeath and devise forever the premises described in this paragraph five to the children of my said sister - - - in equal shares, share and share alike, intending thereby that my brother in law - - -, husband of my said sister - - -, shall not in any manner whatever participate in my estate; neither as heir of his wife or any of his children, and to that end I do hereby ordain, and it is my will and intent, that in case any one or more of the children of my sister die under age and without issue, that his or her surviving brothers and sisters shall inherit such respective share of any deceased child to the absolute and complete exclusion of its or their father - - -."

As no trust was created, the only possible suspension of the absolute power of alienation was by the limitation of future interests to persons not in being. Although at the death of the testator Mary was 68 and had eight

³⁶⁴ *Eldred v. Shaw*, 112 Mich. 237, 70 N.W. 545 (1897); Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§119, 120 (1928).

³⁶⁵ *Id.*, §121.

³⁶⁶ 168 Mich. 642, 134 N.W. 1018 (1912).

children, all of whom were of age, it was possible, in the eye of the law, that she might have further children who might die under age and without issue after her death. The Court held that "in that remote event the limitation would not violate the statute." This decision was sound because the ultimate limitation fell squarely into the provision of Section 16. All of the children of Mary were certain to come into being within a single life in being, that of their mother, each took a "prior remainder in fee," and each ultimate remainder in fee was limited on a contingency by which the estate of the prior remainderman in fee would be determined before he attained his full age.

The language of Section 16 appears to relate only to suspension of the absolute power of alienation by future interests. Whether Section 16 permits the duration of a trust for receipt of the rents and profits of land to be prolonged beyond two designated lives in being is a much more difficult problem. In *Manice v. Manice*,³⁶⁷ land was devised to trustees (1) to apply the rents and profits to the use of the testator's widow for life; (2) at her death to divide into shares and apply the rents and profits of one share to the use of testator's daughter Mary for life; (3) on the death of Mary, to divide her share into as many shares as she had children and hold each on trust to accumulate the rents and profits during the minority of the child and transfer the principal and accumulated rents and profits to it at 21; (4) if any child of Mary die during minority, to transfer its share to its issue, if any, otherwise to the other children of Mary.

³⁶⁷ 43 N.Y. 303 at 374-382 (1871). Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §§122-124 (1928); *PROPERTY RESTATEMENT*, *App.*, Ch. A, ¶161 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §25.17 (1952).

The trusts for accumulation could extend beyond two lives in being and during the minority of children of Mary who were not in being at the death of the testator. Both the trusts and the ultimate limitations were held valid. The Court held that Section 37³⁶⁸ expressly permits trusts for accumulation during the minority of unborn persons and that the interest of such a person is a "prior remainder in fee" within the meaning of Section 16. This is not a decision that any other type of trust may be measured by the minority of an unborn person.

In *Matter of Trevor*,³⁶⁹ part of the residue of an estate was devised to trustees (1) to apply the rents and profits to the use of testator's widow for life; (2) on the death of the widow to divide the principal into three shares and hold each on trust to apply the rents and profits to the use of a designated child until it reached a stipulated age; (3) if any child died before reaching the stipulated age, to divide its share into as many sub-shares as it had issue, which sub-shares should then vest indefeasibly in such issue; (4) to hold the sub-share of any such issue in trust during minority and apply the rents and profits to its use. All persons taking interests under these dispositions would necessarily be in being and ascertained within two designated lives in being, but provision (4) contemplated trusts for receipt of the rents and profits of land which were not for accumulation and which might suspend the absolute power of alienation beyond

³⁶⁸ Rev. Stat. 1846, c. 62, §37, Part Two, note 482 *supra*.

³⁶⁹ 239 N.Y. 6, 145 N.E. 66 (1924). PROPERTY RESTATEMENT, *App.*, Ch. A, ¶62 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.17 (1952). Professor Whiteside explains this decision on the ground that the "trusts" for the issue of the children were not true trusts but mere provisions for custody similar to guardianship. *Sed quare*. Cf. Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §§125, 295-303 (1928).

two lives in being. Moreover, the "prior remainder in fee" of each of the issue was not defeasible. Nevertheless, they were held valid. The language of Section 16 does not extend to this situation and it is doubtful that the Michigan courts would follow the decision.³⁷⁰

E. PERIODS IN GROSS

Under the common-law Rule Against Perpetuities, vesting may be suspended during a period in gross of twenty-one years or less, either following lives in being or unrelated to lives.³⁷¹ Of the suspension statutes the New York revisers said, "the period of twenty-one years, after a life or lives in being, is no longer allowed as an absolute term,"³⁷² and Section 15 and 16³⁷³ certainly did not permit measurement of a period of suspension of the absolute power of alienation by anything except two

³⁷⁰ *Palms v. Palms*, 68 Mich. 355, 36 N.W. 419 (1888), Part Three, note 284 *supra*; *Grand Rapids Trust Co. v. Herbst*, 220 Mich. 321, 190 N.W. 250 (1922), Part Three, note 324 *supra*. Cf. *Blossom v. Anketell*, 275 Fed. 947 (D.C.E.D. Mich. 1921); PROPERTY RESTATEMENT, *App.*, Ch. B, ¶57 (1944). The statement in this paragraph of the *Restatement* to the effect that, in *Niles v. Mason*, 126 Mich. 482, 85 N.W. 1100 (1901), a provision that the share of any grandchild "be under the care of the trustee as agent of the grandchild" during minority was "sustained" is inaccurate. In that case the provisions for the grandchildren were held void. Part Three, notes 238, 314, *supra*. Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §25.43 (1952). Professor Whiteside repeats the statement.

³⁷¹ *Cadell v. Palmer*, 1 Cl. & F. 372, 6 Eng. Rep. 956 (1833), Part Two, note 35 *supra*, cited with approval in *St. Amour v. Rivard*, 2 Mich. 294 at 297 (1852), Part Two, note 39 *supra*; *Toms v. Williams*, 41 Mich. 552, 2 N.W. 814 (1879), Part Two, note 112 *supra*; *Markham v. Hufford*, 123 Mich. 505, 82 N.W. 222, 48 L.R.A. 580 (1900), Part Two, note 114 *supra*; *In re De Bancourt's Estate*, 279 Mich. 518, 272 N.W. 891, 110 A.L.R. 1346 (1937), Part Two, note 115 *supra*.

³⁷² Extracts from the Original Reports of the Revisers, 3 N.Y. Rev. Stat. (2d ed.) 571-573 (1836), Part Three, note 6 *supra*.

³⁷³ Rev. Stat. 1846, c. 62, §§15, 16, Part Three, note 262 *supra*; Chaplin, SUSPENSION OF THE POWER OF ALIENATION, 3rd ed., §271 (1928); PROPERTY RESTATEMENT, *App.*, Ch. A, ¶64, Ch. B, ¶56 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 AMERICAN LAW OF PROPERTY, §§25.18, 25.43 (1952).

lives in being and an actual minority. Hence a future estate could not be limited to a class which might increase to include members not theretofore in being during a fixed term of years,³⁷⁴ and a trust for receipt of the rents and profits of land could not be created to last for a term of years,³⁷⁵ or even for a single year.³⁷⁶

When, under the terms of the instrument creating an interest, suspension was to last for the longer of two alternative periods, one measured by one or two lives in being and the other by a gross term of years, the interest was void. Thus a trust for receipt of the rents and profits of land stipulated to continue until the death of a named beneficiary and, if that beneficiary died within

³⁷⁴ *Farrand v. Petit*, 84 Mich. 671, 48 N.W. 156 (1891) (devise of land to trustees to hold for 20 years and then convey a quarter to the children of each of testator's four children as each grandchild came of age; share of any grandchild who died without issue before such conveyance to be conveyed to the others); *Otis v. Arntz*, 198 Mich. 196, 164 N.W. 498 (1917) (devise of residue on trust for 25 years, then to grandchildren and issue of deceased grandchildren to be ascertained at that time); *In re Richards' Estate*, 283 Mich. 485, 278 N.W. 657 (1938) (devise to trustees for 20 years, then to grandchildren and issue of deceased grandchildren to be ascertained at that time). See: *State v. Holmes*, 115 Mich. 456, 73 N.W. 548 (1898), Part Three, note 88 *supra*. Cf. *Allen v. Merrill*, 223 Mich. 467, 194 N.W. 131 (1923), Part Three, notes 200, 333, *supra*; *In re De Bancourt's Estate*, 279 Mich. 518, 272 N.W. 891 (1937), Part Three, note 182 *supra*. Cf. the complementary provision of Rev. Stat. 1846, c. 62, §20, Part Three, note 1 *supra*.

³⁷⁵ *Farrand v. Petit*, Part Three, note 374 *supra*; *James E. Scripps Corporation v. Parkinson*, 186 Mich. 663, 153 N.W. 29 (1915) (devise to wife upon trust to apply the rents and profits to her own use until October 17, 1864; testator died August 14, 1851, so the period was slightly over 13 years); *Otis v. Arntz*, Part Three, note 374 *supra*; *In re Richards' Estate*, Part Three, note 374 *supra*; *Loomis v. Laramie*, 286 Mich. 707, 282 N.W. 876 (1938) (20 years). Cf. *Fitzgerald v. City of Big Rapids*, 123 Mich. 281, 82 N.W. 56 (1900), Part Three, note 182 *supra*; *Skinner v. Taft*, 140 Mich. 282, 103 N.W. 702 (1905), Part Three, note 241 *supra*; *Gilkey v. Gilkey*, 162 Mich. 664, 127 N.W. 715 (1910), Part Three, note 200 *supra*; *Allen v. Merrill*, 223 Mich. 467, 194 N.W. 131 (1923), Part Three, notes 200, 333, *supra*; *In re De Bancourt's Estate*, 279 Mich. 518, 272 N.W. 891 (1937), Part Three, note 182 *supra*.

³⁷⁶ *De Buck v. Bousson*, 295 Mich. 164, 294 N.W. 135 (1940).

fourteen years from the date of the creating instrument, until the expiration of such fourteen years, was invalid.³⁷⁷ On the other hand, when, under the terms of the creating instrument, suspension could not last beyond the shorter of two alternative periods, one measured by one or two lives in being and the other by a gross term of years, the interest thereby created did not offend the suspension statutes.³⁷⁸ In *Ward v. Ward*,³⁷⁹ a devise to trustees to receive the rents and profits for twelve years "or until the death after my decease and prior to the expiration of said period of 12 years, of two of my children who shall survive me" was treated as valid. In *Young v. Young*,³⁸⁰ a devise to a trustee to receive the rents and profits and pay them over to the testator's two children for ten years if they should so long live was treated as valid. In *Miller v. Curtiss*,³⁸¹ the residue of an estate was devised to a trustee to pay the income and five per cent of the principal annually to Phyllis Jane Russell, and, if she should die before distribution of the principal was completed, the remainder was devised to her children or, if there were none, to seven named persons. The Court rejected a contention that this trust

³⁷⁷ *Casgrain v. Hammond*, 134 Mich. 419, 96 N.W. 510 (1903), Part Three, note 213 *supra*. Accord: *Schneiber v. Schneiber*, 199 Mich. 630, 165 N.W. 660 (1917), Part Three, note 213 *supra* (life of widow or 20 years, whichever was longer).

³⁷⁸ Chaplin, *SUSPENSION OF THE POWER OF ALIENATION*, 3rd ed., §134 (1928); *PROPERTY RESTATEMENT, App.*, Ch. A, ¶67, Ch. B, ¶56 (1944); Whiteside, "Statutory Rules: Perpetuities and Accumulations," 6 *AMERICAN LAW OF PROPERTY*, §§25.18, 25.43 (1952).

³⁷⁹ 163 Mich. 570, 128 N.W. 761 (1910), Part Three, note 303 *supra*. Six children survived the testator.

³⁸⁰ 255 Mich. 173, 237 N.W. 535, 77 A.L.R. 963 (1931).

³⁸¹ 328 Mich. 239, 43 N.W. (2d) 834 (1950). Accord: *Blossom v. Anketell*, 275 Fed. 947 (D.C.E.D. Mich. 1921) (until death of Julia or expiration of two years, whichever shall soonest occur).

suspended the absolute power of alienation for twenty years in gross, saying,

"In any event, the trust cannot continue beyond the lifetime of Phyllis Jane Russell. The suspension of the power of alienation is not for a period beyond the lifetime of Phyllis Jane Russell; it will be shorter than her lifetime if she lives more than 20 years after the death of the testator.

"The trust period is not in gross, but is for the lifetime or less than the lifetime of one person, the first and direct beneficiary. It is not necessary to examine into plaintiff's theories as to the class or classes of remaindermen. It is of no moment to consider how many of the contingent remaindermen may die before the death of Phyllis Jane Russell." ³⁸²

It will be recalled that, in *Bateson v. Bateson*,³⁸³ a trust to receive the rents and profits of land and pay them to the testator's grandson James for fifteen years or until his earlier death was treated by the majority of the Court as suspending the absolute power of alienation for a gross period of fifteen years and so void. This view was, of course, unsound and contrary to the preceding three cases mentioned. A trust which cannot last longer than one life in being does not suspend the absolute power of alienation for a term in gross merely because it may terminate before the expiration of that life. Three of the seven justices sitting in *Bateson v. Bateson* dissented on this point.³⁸⁴ The decision in the later case of *Miller v. Curtiss* was unanimous.³⁸⁵ Insofar as *Bateson v. Bateson* held, contrary to the New York and all other Michigan decisions, that the absolute power of alienation

³⁸² 328 Mich. 239 at 242-243. Per Reid, J. The decision was unanimous.

³⁸³ 294 Mich. 426, 293 N.W. 705 (1940), Part Three, note 344 *supra*.

³⁸⁴ Part Three, note 348 *supra*.

³⁸⁵ Part Three, note 381 *supra*.

could not be suspended for the shorter of two alternative periods, one measured by one or two lives and the other by a gross term of years, it must be deemed to have been overruled *sub silentio*.

TABLE OF STATUTORY AND CONSTITUTIONAL CITATIONS

[References are to footnotes. The number which precedes the decimal point indicates the part; the figure which follows the decimal point is the footnote number.]

English Statutes

- Leges Edw. Confessoris, c. 37 (1043), 1.665
- Magna Carta, c. 39 (1217), 1.4
- Hen. III, 1 Stat. of the Realm 203-204, 1.473
- 9 Hen. III, Stat. 1, c. 31 (1225), 1.7
- 9 Hen. III, stat. 1, c. 32 (1225), 1.4
- 51 Hen. III, stat. 6, c. 3, §5 (1266), 1.463
- 6 Edw. I, c. 5 (1278) (Statute of Gloucester), 1.296, 1.242
- 6 Edw. I, c. (1278) (Statute of Gloucester), 1.242
- 6 Edw. I, c. 11 (1278) (Statute of Gloucester), 1.299
- 7 Edw. I, stat. 2 (1279) (Statute of Mortmain), 1.525
- 12 Edw. I, c. 10 (1284) (Statute of Wales), 1.4, 1.297
- 13 Edw. I, stat. 1, c. 1 (1285) (De Donis Conditionalibus), 1.45, 1.59, 1.62, 1.68
- 13 Edw. I, stat. 1, c. 18 (1285) (Westminster II), 1.26, 1.293
- 18 Edw. I, stat. 1 (1290) (Quia Emptores Terrarum), 1.6, 1.25, 1.46, 1.104, 1.211, 1.346, 1.354, 1.424, 1.722, 2.4, 2.5
- 25 Edw. I, stat. 1, c. 1 (1297), 1.4
- 28 Edw. I, stat. 3, c. 1 (1300), 1.4
- 17 Edw. II, stat. 1, c. 7 (1324), 1.7
- 1 Edw. III, stat. 2, c. 12 (1327), 1.7
- 1 Edw. III, stat. 2, c. 13 (1327), 1.7
- 15 Edw. III, stat. 1, c. 5 (1341), 1.665
- 25 Edw. III, stat. 4, c. 3 (1350), 1.463
- 37 Edw. III, c. 5 (1363), 1.467
- 42 Edw. III, c. 1 (1368), 1.4
- 50 Edw. III, c. 6, §2 (1376), 1.532
- 1 Ric. II, c. 9 (1377), 1.532
- 2 Ric. II, stat. 1, c. 2 (1378), 1.463
- 15 Ric. II, c. 5, §§5, 7 (1391), 1.528
- 4 Hen. IV, c. 7 (1402), 1.532
- 11 Hen. VI, cc. 3, 5 (1433), 1.532
- 1 Ric. III, c. 1 (1483), 1.12, 1.541
- 1 Ric. III, c. 7, §5 (1483), 1.68
- 3 Hen. VII, cc. 5, 6 (1487), 1.665
- 4 Hen. VII, c. 4 (1487), 1.13, 1.530
- 4 Hen. VII, c. 24 (1487), 1.68
- 7 Hen. VII, c. 3 (1490), 1.13, 1.530
- 11 Hen. VII, c. 8 (1494), 1.671
- 3 Hen. VIII, c. 4 (1511), 1.13, 1.530
- 21 Hen. VIII, c. 15, §3 (1529), 1.299
- 23 Hen. VIII, c. 10 (1531), 1.528
- 25 Hen. VIII, c. 2 (1533), 1.465
- 26 Hen. VIII, c. 13, §5 (1534), 1.72
- 27 Hen. VIII, c. 10 (1535) (Statute of Uses), 1.14, 1.40, 1.354, 1.410, 1.542, 1.691, 2.148

614 PERPETUITIES AND OTHER RESTRAINTS

- 31 Hen. VIII, c. 1, §2 (1539), 1.196
- 32 Hen. VIII, c. 1 (1540) (Statute of Wills), 1.15, 1.175, 1.238, 1.417, 2.148
- 32 Hen. VIII, c. 9 (1540), 1.40, 1.359, 1.373
- 32 Hen. VIII, c. 28, §§1, 2 (1540), 1.69
- 32 Hen. VIII, c. 31 (1540), 1.263
- 32 Hen. VIII, c. 34, §1 (1540), 1.360
- 32 Hen. VIII, c. 36 (1540), 1.68
- 33 Hen. VIII, c. 20, §3 (1541), 1.72
- 33 Hen. VIII, c. 39, §75 (1541), 1.72
- 34 & 35 Hen. VIII, c. 5 (1542), 1.15, 1.73, 1.175, 1.238
- 34 & 35 Hen. VIII, c. 20 (1542), 1.67, 1.69
- 37 Hen. VIII, c. 9, §§3, 4 (1545), 1.672
- 1 Edw. VI, c. 4 (1547), 1.7
- 3 & 4 Edw. VI, c. 21 (1549), 1.470, 1.472
- 5 & 6 Edw. VI, c. 14 (1552), 1.463, 1.466, 1.488, 1.499
- 5 & 6 Edw. VI, c. 20 (1552), 1.673
- 1 Eliz. I, c. 19 (1558), 1.219
- 13 Eliz. I, c. 8, §§2, 5, 9 (1570), 1.673
- 13 Eliz. I, cc. 10, 20 (1571), 1.219
- 14 Eliz. I, c. 8 (1572), 1.67, 1.263
- 14 Eliz. I, c. 11 (1572), 1.219
- 18 Eliz. I, c. 11 (1575), 1.219
- 39 Eliz. I, c. 18, §§12, 33 (1597), 1.673
- 43 Eliz. I, c. 4 (1601) (Charitable Uses), 1.40
- 1 Jac. I, c. 3 (1603), 1.219
- 21 Jac. I, c. 17, §2 (1623), 1.674
- 21 Jac. I, c. 19, §12 (1623), 1.72
- 21 Jac. I, c. 22 (1623), 1.470
- 3 Car. I, c. 4, §5 (1627), 1.674
- 12 Car. II, c. 13, §2 (1660), 1.674
- 12 Car. II, c. 24, §1 (1660), 1.7, 1.15
- 29 Car. II, c. 3, §12 (1676) (Statute of Frauds), 1.15, 1.240
- 29 Car. II, c. 7 (1676), 1.40
- 10 & 11 Gul. III, c. 16 (1699), 2.9, 2.21
- 4 Ann., c. 16, §9 (1705), 1.3, 1.356
- 12 Ann., stat. 2, c. 16, §1 (1713), 1.674
- 6 Geo. I, c. 18, §§18-21 (1720), 1.523
- 14 Geo. II, c. 20 (1741), 1.68, 1.240
- 12 Geo. III, c. 71 (1772), 1.472
- 14 Geo. III, c. 83, §§1, 18 (1774) (Quebec Act), 1.31
- 31 Geo. III, c. 31 (1791) (Canada Act), 1.32
- 3 Geo. IV, c. 41 (1822), 1.474
- 5 Geo. IV, c. 66 (1824), 1.474
- 5 Geo. IV, c. 95 (1824), 1.474
- 1 Vict., c. 26, §29 (1837), 2.175
- 7 & 8 Vict., c. 24 (1844), 1.474
- 17 & 18 Vict., c. 90 (1854), 1.674
- 44 & 45 Vict., c. 41, §52 (1881), 3.139
- 15 Geo. V, c. 20, §1 (Law of Property Act, 1925), 2.37
- 15 Geo. V, c. 20, §4 (3) (Law of Property Act, 1925), 2.343
- 15 Geo. V, c. 20, §155 (Law of Property Act, 1925), 3.139

- 15 Geo. V, c. 20, §161 (Law of Property Act, 1925), 2.13
- 15 Geo. V, c. 20, §163 (Law of Property Act, 1925), 2.104
- 15 Geo. V, c. 20, First Schedule, Part I (1925), 2.37
- 25 & 26 Geo. V, c. 30, §2 [Law Reform (Married Women and Tort-feasors) Act, 1935], 1.557, 2.453
- 1 & 2 Geo. VI, c. 53 (Hire-Purchase Act, 1938), 1.454, 1.458
- 11 & 12 Geo. VI, c. 66 (1948), 1.477
- 12, 13 & 14 Geo. VI, c. 78, §1 [Married Women (Restraint Upon Anticipation) Act, 1949], 1.557, 2.453

United States Constitution

- Art. I, §VIII, cl. 3 and Amendment X, 1.485

United States Statutes

- Ordinance of 1787, §5, 1.39
- Act. Jan. 11, 1805, 2 Stat. 309, 1.39
- Act. Jul. 2, 1890, §1, 26 Stat. 209, 15 U.S.C. 1, 1.486
- Act Sep. 26, 1914, 38 Stat. 717, 15 U.S.C. 41 et seq., 1.492
- Act Aug. 17, 1937, Tit. VIII, 50 Stat. 693, 15 U.S.C. 1, 1.491, 1.496
- Act Jul. 14, 1952, 66 Stat. 632, 15 U.S.C. 45, 1.496

Michigan Constitution, 1850

- Art. 16, §5, 1.152, 1.175
- Art. 18, §12, 1.306
- Schedule, 1.41

Michigan Constitution, 1908

- Art. 16, §8, 1.152
- Art. 16, §10, 1.306, 1.350, 2.570
- Schedule, 1.41

Michigan Statutes

- 32 Geo. III (Upper Canada), c. 1, §3 (1792), 1.33, 1.41, 1.364, 2.30
- Act Jan. 31, 1809, 2 Laws Terr. Mich. 13, 1.175
- Act Sep. 16, 1810, 1 Laws Terr. Mich. 210, 900, 1.38, 1.40, 1.41
- Act Apr. 24, 1820, 1 Laws Terr. Mich. 633, 1.202
- Act Mar. 2, 1821, 1 Laws Terr. Mich. 815, 1.82, 1.93, 2.68
- Act Apr. 12, 1827, 2 Laws Terr. Mich. 388, 1.202
- Act Apr. 13, 1827, 3 Laws Terr. Mich. 602, 603, 1.38
- Revised Statutes, 1838, pp. 257-69, 1.134
 - p. 258, 1.83, 1.89, 2.38, 2.68
 - p. 266, §24, 1.371
 - p. 270, 1.175
 - p. 481, 1.202
- Act 42, P.A. 1842, §6, 1.220
- Act 62, P.A. 1843, 1.700, 1.701
- Revised Statutes, 1846, c. 62, 2.177
 - c. 62, Title, 2.184
 - c. 62, §1, 1.132, 2.184
 - c. 62, §2, 1.132
 - c. 62, §3, 1.85, 1.93, 1.132, 2.68, 2.181
 - c. 62, §4, 1.85, 1.93, 1.132, 2.68, 2.182
 - c. 62, §5, 1.132, 1.257, 1.307, 1.633

- c. 62, §6, 1.257
- c. 62, §7, 1.371, 2.179
- c. 62, §8, 1.371, 2.179, 2.184, 2.355
- c. 62, §9, 1.370, 1.371, 2.179
- c. 62, §10, 1.371, 2.179
- c. 62, §11, 1.371, 2.180
- c. 62, §12, 1.371, 2.330
- c. 62, §13, 1.371, 2.184, 2.209
- c. 62, §14, 1.279, 1.371, 1.591, 2.46, 2.47, 3.1, 3.20, 3.67, 3.76, 3.100, 3.144, 3.147, 3.209, 3.218
- c. 62, §15, 1.279, 1.371, 1.591, 1.593, 1.639, 2.46, 2.47, 3.1, 3.20, 3.22, 3.67, 3.100, 3.144, 3.219, 3.262, 3.266, 3.373
- c. 62, §16, 1.279, 1.371, 1.591, 2.46, 2.47, 2.180, 3.1, 3.262, 3.282, 3.373
- c. 62, §17, 1.257, 1.267, 1.280, 1.371, 1.591, 2.46, 2.280, 2.534, 3.1, 3.42, 3.67, 3.220, 3.319, 3.339
- c. 62, §18, 1.257, 1.280, 1.371, 1.591, 2.46, 3.1, 3.42, 3.47, 3.67
- c. 62, §19, 1.257, 1.280, 1.371, 1.591, 2.46, 3.1, 3.42
- c. 62, §20, 1.307, 1.371, 1.591, 2.46, 2.180, 2.570, 3.1, 3.23, 3.67, 3.85, 3.374
- c. 62, §21, 1.257, 1.307, 1.371, 2.180, 3.1, 3.42, 3.48, 3.67
- c. 62, §22, 2.182
- c. 62, §23, 1.307, 1.308, 1.371, 2.46, 2.180, 3.1, 3.85
- c. 62, §24, 1.257, 1.307, 1.371, 1.392, 2.178, 2.180, 2.194, 3.20
- c. 62, §27, 1.257, 1.307, 1.342, 2.180
- c. 62, §28, 1.89, 2.181
- c. 62, §29, 1.257, 1.267, 2.189
- c. 62, §§30, 31, 2.106, 3.262, 3.288
- c. 62, §32, 1.242, 2.38, 2.188
- c. 62, §33, 1.179, 2.188
- c. 62, §34, 1.156
- c. 62, §35, 1.371, 2.203
- c. 62, §36, 2.184
- c. 62, §37, 1.585, 2.184, 2.482, 3.309
- c. 62, §38, 2.184, 2.482, 3.220
- c. 62, §39, 2.184, 2.482, 2.496
- c. 62, §40, 2.184, 2.482
- c. 62, §41, 2.502, 3.1, 3.144, 3.262, 3.266
- c. 62, §42, 1.371
- c. 62, §43, 1.166
- c. 62, §44, 1.166, 2.178, 2.184
- c. 62, §45, 2.178
- c. 62, §46, 1.143, 2.178, 2.184
- Revised Statutes, 1846, c. 63, 1.583
- c. 63, §3, 1.588, 1.634
- c. 63, §7, 1.271
- c. 63, §11, 1.586, 2.483, 3.192, 3.202, 3.225
- c. 63, §13, 1.587, 1.595, 1.639
- c. 63, §16, 1.587, 3.45
- c. 63, §19, 1.587, 1.590, 1.595, 1.620, 1.621, 1.639, 2.54, 2.462, 3.202, 3.211, 3.225, 3.246
- c. 63, §20, 1.598

- c. 63, §21, 1.602, 1.609, 2.54, 2.462, 3.202
- c. 63, §24, 1.600
- Revised Statutes, 1846, c. 64, 3.119
 - c. 64, §§2, 4, 3.119
 - c. 64, §5, 3.119, 3.122
 - c. 64, §6, 2.71, 3.119, 3.122
 - c. 64, §7, 3.119
 - c. 64, §9, 1.183, 2.304, 3.147
 - c. 64, §10, 2.304, 3.147
 - c. 64, §11, 2.304, 3.147
 - c. 64, §12, 2.75, 2.293, 2.297, 2.304, 3.147
 - c. 64, §13, 1.183, 2.304, 3.147
 - c. 64, §14, 2.304, 3.147
 - c. 64, §§15, 17, 3.140
 - c. 64, §22, 3.119, 3.122, 3.123, 3.132
 - c. 64, §23, 2.296, 3.119, 3.122, 3.123, 3.132, 3.140
 - c. 64, §24, 2.296, 3.119, 3.124
 - c. 64, §§25 to 27, 3.119
 - c. 64, §28, 2.296, 3.119
 - c. 64, §§29, 33, 3.119
 - c. 64, §36, 3.119, 3.136
 - c. 64, §47, 3.119
 - c. 64, §48, 3.119, 3.137
 - c. 64, §55, 2.302, 3.145, 3.148
 - c. 64, §56, 2.302, 2.325, 3.145, 3.148
 - c. 64, §62, 3.122
- Revised Statutes, 1846, c. 65, §4, 1.156, 1.242
 - c. 65, §7, 1.373
- Revised Statutes, 1846, c. 66, §13, 1.379
- Revised Statutes, 1846, c. 67, §1, 1.174
- Revised Statutes, 1846, c. 68, §1, 1.175
- Revised Statutes, 1846, c. 74, §5, 1.209
- Revised Statutes, 1846, c. 85, §25, 1.151
- Revised Statutes, 1846, c. 90, §§24, 25, 1.628
- Revised Statutes, 1846, c. 108, §61, 1.701
- Revised Statutes, 1846, c. 109, §1, 1.202
- Revised Statutes, 1846, c. 110, §6, 1.242
- Revised Statutes, 1846, c. 111, §3, 1.337
- Revised Statutes, 1846, c. 123, §26, 1.325
- Act 235, P.A. 1849, §4, 1.220
- Act 184, P.A. 1851, 1.628
- Act 80, P.A. 1855, §6, 1.220
- Act 120, P.A. 1855, 1.628
- Act 145, P.A. 1855, §21, 2.406
- Act 168, P.A. 1855, 1.152, 1.175
- Act 191, P.A. 1877, §4, 1.522
- Act 233, P.A. 1887, 1.283, 1.606, 1.607, 2.80
- Act 209, P.A. 1897, 2.406
- Act 230, P.A. 1897, 1.161
- Act 255, P.A. 1899, §§1, 8, 1.497, 1.516
- Act 29, P.A. 1901, §7, 1.220
- Act 229, P.A. 1905, 1.497

618 PERPETUITIES AND OTHER RESTRAINTS

- Act 122, P.A. 1907, 1.593, 2.421, 2.422, 2.432, 2.436
- Act 125, P.A. 1911, 2.421, 2.422, 2.447
- Act 106, P.A. 1913, §15, 1.522
- Act 135, P.A. 1913, 1.518
- Act 380, P.A. 1913, 2.400, 2.421, 2.447
- Act 280, P.A. 1915, 1.220, 1.593, 2.421, 2.447
- Act 314, P.A. 1915, c. 6, §4 (6), 1.628
- Act 314, P.A. 1915, c. 19, §§62 to 70, 1.283, 1.606, 1.607, 2.80
- Act 314, P.A. 1915, c. 23, §141, 1.335
- Act 314, P.A. 1915, c. 29, §54, 1.701
- Act 314, P.A. 1915, c. 30, §25, 1.325, 1.715
- Act 314, P.A. 1915, c. 33, §19, 1.337
- Act 63, P.A. 1917, §5, 1.220
- Act 72, P.A. 1917, §§24 to 28, 1.521
- Act 243, P.A. 1917, 1.715
- Act 249, P.A. 1921, 1.648, 3.352
- Act 220, P.A. 1923, 1.523
- Act 60, P.A. 1925, 1.497
- Act 228, P.A. 1925, 1.703
- Act 258, P.A. 1925, 1.224, 1.606, 1.660
- Act 373, P.A. 1925, 1.220, 1.593, 2.421
- Act 373, P.A. 1927, 1.715
- Act 172, P.A. 1929, 1.211
- Act 211, P.A. 1931, 1.372, 2.265
- Act 219, P.A. 1931, 1.374
- Act 327, P.A. 1931, §§102, 119, 1.522
- Act 327, P.A. 1931, §§152, 161, 174, 183, 1.220
- Act 328, P.A. 1931, §175, 1.455
- Act 122, P.A. 1933, 1.715
- Act 50, P.A. 1937, 1.518
- Act 282, P.A. 1937, 1.518
- Act 288, P.A. 1939, c. 2, §§45 to 48, 1.648, 3.352
- Act 288, P.A. 1939, c. 2, §98, 1.209
- Act 296, P.A. 1945, 3.141, 3.142
- Act 193, P.A. 1947, 2.387, 2.421, 2.508
- Act 38, P.A. 1949, 1.232, 1.257, 1.279, 1.307, 1.591, 1.594, 2.46, 2.61, 2.180, 2.534, 2.570, 3.3, 3.8, 3.48, 3.76, 3.85, 3.262
- Act 227, P.A. 1949, 1.585, 2.184, 2.482, 2.501, 3.8, 3.48
- Act 61, P.A. 1951, 2.387, 2.421, 2.508
- Act 6, P.A. 1952, 1.585, 2.482
- Act 7, P.A. 1952, 2.482
- Michigan Statutes Annotated, 1937
 - §5.3421; 2.400, 2.421, 2.447
 - §§19.321 to 19.324; 1.518
 - §19.345; 1.522
 - §§19.741 to 19.773; 1.523
 - §§20.24 to 20.28; 1.521
 - §§20.94, 21.103, 21.120; 1.522
 - §§21.153, 21.162, 21.175, 21.184, 21.446; 1.220
 - §§21.661 to 21.683; 1.161
 - §§21.1234, 21.1265, 21.1767, 21.1806; 1.220
 - §26.1; 1.132, 2.177, 2.184

- §26.2; 1.32, 2.177
- §26.3; 1.85, 1.93, 1.132, 2.68, 2.177, 2.181
- §26.4; 1.85, 1.93, 1.132, 2.68, 2.177, 2.182
- §26.5; 1.132, 1.257, 1.307, 1.633, 2.177
- §26.6; 1.257, 2.177
- §26.7; 1.371, 2.177, 2.179
- §26.8; 1.371, 2.177, 2.179, 2.184, 2.355
- §26.9; 1.370, 1.371, 2.177, 2.179
- §26.10; 1.371, 2.177, 2.179
- §26.11; 1.371, 2.177, 2.180
- §26.12; 1.371, 2.177, 2.330
- §26.13; 1.371, 2.177, 2.184, 2.209
- §26.14; 1.279, 1.371, 1.591, 2.46, 2.47, 2.177, 3.1, 3.20, 3.67, 3.76, 3.100, 3.144, 3.147, 3.209, 3.218
- §26.15; 1.279, 1.371, 1.591, 1.593, 1.639, 2.46, 2.47, 2.177, 3.1, 3.20, 3.22, 3.67, 3.100, 3.144, 3.219, 3.262, 3.266, 3.373
- §26.16; 1.279, 1.371, 1.591, 2.46, 2.47, 2.177, 2.180, 3.1, 3.262, 3.282, 3.373
- §26.17; 1.257, 1.267, 1.280, 1.371, 1.591, 2.46, 2.177, 2.280, 2.534, 3.1, 3.42, 3.67, 3.220, 3.319, 3.339
- §26.18; 1.257, 1.280, 1.371, 1.591, 2.46, 2.177, 3.1, 3.42, 3.47, 3.67
- §26.19; 1.257, 1.280, 1.371, 1.591, 2.46, 2.177, 3.1, 3.42
- §26.20; 1.307, 1.371, 1.591, 2.46, 2.177, 2.180, 2.570, 3.1, 3.23, 3.67, 3.85, 3.374
- §26.21; 1.257, 1.307, 1.371, 2.177, 2.180, 3.1, 3.42, 3.48, 3.67
- §26.22; 2.177, 2.182
- §26.23; 1.307, 1.308, 1.371, 2.46, 2.177, 2.180, 3.1, 3.85
- §26.24; 1.257, 1.307, 1.371, 1.392, 2.177, 2.178, 2.180, 2.194, 3.20
- §§26.25, 26.26; 2.177
- §26.27; 1.257, 1.307, 1.342, 2.177, 2.180
- §26.28; 1.89, 2.177, 2.181
- §26.29; 1.257, 1.267, 2.177, 2.189
- §§26.30, 26.31; 2.106, 2.177, 3.262, 3.288
- §26.32; 1.242, 2.38, 2.177, 2.188
- §26.33; 1.179, 2.177, 2.188
- §26.34; 1.156, 2.177, 2.188
- §26.35; 1.371, 2.177, 2.203
- §26.36; 2.177, 2.184
- §26.37; 1.585, 2.177, 2.184, 2.482, 2.501, 3.8, 3.48, 3.309
- §26.38; 1.585, 2.177, 2.184, 2.482, 2.501, 3.8, 3.48, 3.220
- §26.39; 2.177, 2.184, 2.482, 2.496
- §26.40; 2.177, 2.184, 2.482
- §26.41; 2.177, 2.502, 3.1, 3.144, 3.262, 3.266
- §26.42; 1.371, 2.177
- §26.43; 1.166, 2.177
- §26.44; 1.166, 2.177, 2.178, 2.184
- §26.45; 2.177, 2.178
- §26.46; 1.143, 1.282, 2.177, 2.178, 2.184
- §26.47; 1.372, 2.265
- §26.49 (1-3); 1.232, 1.257, 1.279, 1.307, 1.591, 1.594, 2.46, 2.61, 2.180, 2.534, 2.570, 3.3, 3.8, 3.48, 3.76, 3.85, 3.262
- §§26.51 to 26.52; 1.583

620 PERPETUITIES AND OTHER RESTRAINTS

§26.53; 1.583, 1.588, 1.634
 §§26.54 to 26.56; 1.583
 §26.57; 1.271, 1.583
 §§26.58 to 26.60; 1.583
 §26.61; 1.583, 1.586, 2.483, 3.192, 3.202, 3.225
 §26.62; 1.583
 §26.63; 1.583, 1.587, 1.595, 1.639
 §§26.64, 26.65; 1.583
 §26.66; 1.583, 1.587, 3.45
 §26.67, 26.68; 1.583
 §26.69; 1.583, 1.587, 1.590, 1.595, 1.620, 1.621, 1.639, 2.54, 2.462,
 3.202, 3.211, 3.225, 3.246
 §26.70; 1.583, 1.598
 §26.71; 1.583, 1.602, 1.609, 2.54, 2.462, 3.202
 §§26.72, 26.73; 1.583
 §26.74; 1.583, 1.600
 §§26.75 to 26.77; 1.583
 §§26.82 (1-2); 2.387, 2.421, 2.508
 §§26.91 to 26.94; 3.119
 §26.95; 3.119, 3.122
 §26.96; 2.71, 3.119, 3.122
 §§26.97, 26.98; 3.119
 §26.99; 1.183, 2.304, 3.119, 3.147
 §§26.100, 26.101; 2.304, 3.119, 3.147
 §26.102; 2.75, 2.293, 2.297, 2.304, 3.119, 3.147
 §26.103; 1.183, 2.304, 3.119, 3.147
 §26.104; 2.304, 3.119, 3.147
 §26.105; 3.119, 3.140
 §26.106; 3.119
 §26.107; 3.119, 3.140
 §§26.108 to 26.111; 3.119
 §26.112; 3.119, 3.122, 3.123, 3.132
 §26.113; 2.296, 3.119, 3.122, 3.123, 3.132, 3.140
 §26.114; 2.296, 3.119, 3.124
 §§26.115 to 26.117; 3.119
 §26.118; 2.296, 3.119
 §§26.119 to 26.125; 3.119
 §26.126; 3.119, 3.136
 §§26.127 to 26.137; 3.119
 §26.138; 3.119, 3.137
 §§26.139 to 26.144; 3.119
 §26.145; 2.302, 3.119, 3.145, 3.148
 §26.146; 2.302, 2.325, 3.119, 3.145, 3.148
 §§26.147 to 26.151; 3.119
 §26.152; 3.119, 3.122
 §§26.154 (1-6); 3.141, 3.142
 §26.161; 1.152, 1.175
 §26.229; 1.379
 §§26.431 to 26.509; 1.211
 §26.523; 1.156, 1.242
 §26.526; 1.373
 §26.851; 1.374

§§26.1131, 26.1132; 1.703
 §§26.1191 to 26.1193; 1.220, 1.593, 2.421, 2.447
 §§26.1201, 26.1202; 1.220, 1.593, 2.421
 §§26.1211 to 26.1214; 1.224, 1.606, 1.660
 §27.545 (b); 1.628
 §§27.1188 to 27.1196; 1.283, 1.606, 1.607, 2.80
 §27.1640; 1.335
 §27.1967; 1.701
 §27.1999; 1.325, 1.715
 §27.2012; 1.202
 §27.2130; 1.337
 §27.2146; 1.242
 §27.3178 (71); 1.175
 §§27.3178 (115-118); 1.648, 3.352
 §27.3178 (150); 1.174
 §27.3178 (168); 1.209
 §§28.31, 28.36; 1.497, 1.516
 §§28.51 to 28.55; 1.497
 §§28.71 to 28.77; 1.518
 §§28.78 (1-14); 1.518
 §28.374; 1.455

Compiled Laws, 1948

§123.871; 2.400, 2.421, 2.447
 §441.15; 1.522
 §§445.151 to 445.154; 1.518
 §§445.171 to 445.184; 1.518
 §§445.701, 445.708; 1.497, 1.516
 §§445.761 to 445.767; 1.497
 §§445.791 to 445.798; 1.518
 §§449.24 to 449.28; 1.521
 §449.304; 1.522
 §§450.102, 450.119; 1.522
 §§450.152, 450.161, 450.174, 450.183; 1.220
 §§451.101 to 451.133; 1.523
 §453.236; 1.220
 §§455.1 to 455.24; 1.161
 §457.234; 1.220
 §457.265; 1.220
 §458.87; 1.220
 §458.156; 1.220
 Chapter 554; 2.177
 §554.1; 1.132, 2.184
 §554.2; 1.132
 §554.3; 1.85, 1.93, 1.32, 2.68, 2.181
 §554.4; 1.85, 1.93, 1.132, 2.68, 2.182
 §554.5; 1.132, 1.257, 1.307, 1.633
 §554.6; 1.257
 §554.7; 1.371, 2.179
 §554.8; 1.371, 2.179, 2.184, 2.355
 §554.9; 1.370, 1.371, 2.179
 §554.10; 1.371, 2.179
 §554.11; 1.371, 2.180

622 PERPETUITIES AND OTHER RESTRAINTS

- §554.12; 1.371, 2.330
- §554.13; 1.371, 2.184, 2.209
- §554.14; 1.279, 1.371, 1.591, 2.46, 2.47, 3.1, 3.20, 3.67, 3.76, 3.100, 3.144, 3.147, 3.209, 3.218
- §554.15; 1.279, 1.371, 1.591, 1.593, 1.639, 2.46, 2.47, 3.1, 3.20, 3.22, 3.67, 3.100, 3.144, 3.219, 3.262, 3.266, 3.373
- §554.16; 1.279, 1.371, 1.591, 2.46, 2.47, 2.180, 3.1, 3.262, 3.282, 3.373
- §554.17; 1.257, 1.267, 1.280, 1.371, 1.591, 2.46, 2.280, 2.534, 3.1, 3.42, 3.67, 3.220, 3.319, 3.339
- §554.18; 1.257, 1.280, 1.371, 1.591, 2.46, 3.1, 3.42, 3.47, 3.67
- §554.19; 1.257, 1.280, 1.371, 1.591, 2.46, 3.1, 3.42
- §554.20; 1.307, 1.371, 1.591, 2.46, 2.180, 2.570, 3.1, 3.23, 3.67, 3.85, 3.374
- §554.21; 1.257, 1.307, 1.371, 2.180, 3.1, 3.42, 3.48, 3.67
- §554.22; 2.182
- §554.23; 1.307, 1.308, 1.371, 2.46, 2.180, 3.1, 3.85
- §554.24; 1.257, 1.307, 1.371, 1.392, 2.178, 2.180, 2.194, 3.20
- §554.27; 1.257, 1.307, 1.342, 2.180
- §554.28; 1.89, 2.181
- §554.29; 1.257, 1.267, 2.189
- §§554.30, 554.31; 2.106, 3.262, 3.288
- §554.32; 1.242, 2.38, 2.188
- §554.33; 1.179, 2.188
- §554.34; 1.156, 2.188
- §554.35; 1.337, 2.203
- §554.36; 2.184
- §554.37; 1.585, 2.184, 2.482, 2.501, 3.8, 3.48, 3.309
- §554.38; 1.585, 2.184, 2.482, 2.501, 3.8, 3.48, 3.220
- §554.39; 2.184, 2.482, 2.496
- §554.40; 2.184, 2.482
- §554.41; 2.502, 3.1, 3.144, 3.262, 3.266
- §554.42; 1.371
- §554.43; 1.166
- §554.44; 1.166, 2.178, 2.184
- §554.45; 2.178
- §554.46; 1.143, 1.282, 2.178, 2.184
- §§554.51 to 554.53; 1.232, 1.257, 1.279, 1.307, 1.591, 1.594, 2.46, 2.61, 2.180, 2.534, 2.570, 3.3, 3.8, 3.48, 3.76, 3.85, 3.262
- §554.101; 1.372, 2.265
- §554.111; 1.374
- §§554.211, 554.212; 1.703
- §§554.351 to 554.353; 1.220, 1.593, 2.421, 2.447
- §§554.381, 554.382; 1.220, 1.593, 2.421
- §§554.401 to 554.404; 1.224, 1.606, 1.660
- Chapter 555; 1.583
- §555.3; 1.588, 1.634
- §555.7; 1.271
- §555.11; 1.586, 2.483, 3.192, 3.202, 3.225
- §555.13; 1.587, 1.595, 1.639
- §555.16; 1.587, 3.45
- §555.19; 1.587, 1.590, 1.595, 1.620, 1.621, 1.639, 2.54, 2.462, 3.202, 3.211, 3.225, 3.246

§555.20; 1.598
 §555.21; 1.602, 1.609, 2.54, 2.462, 3.202
 §555.24; 1.600
 §§555.301, 555.302; 2.387, 2.421, 2.508
 Chapter 556; 3.119
 §§556.2, 556.4; 3.119
 §556.5; 3.119, 3.122
 §556.6; 2.71, 3.119, 3.122
 §556.7; 3.119
 §556.9; 1.183, 2.304, 3.147
 §§556.10, 556.11; 2.304, 3.147
 §556.12; 1.75, 1.293, 1.297, 1.304, 3.147
 §556.13; 1.183, 2.304, 3.147
 §556.14; 2.304, 3.147
 §§556.15, 17; 3.140
 §556.22; 3.119, 3.122, 3.123, 3.132
 §556.23; 2.296, 3.119, 3.122, 3.123, 3.132, 3.140
 §556.24; 2.296, 3.119, 3.124
 §§556.25 to 556.27; 3.119
 §556.28; 2.296, 3.119
 §§556.29, 556.33; 3.119
 §556.36; 3.119, 3.136
 §556.47; 3.119
 §556.48; 3.119, 3.137
 §556.55; 2.302, 3.145, 3.148
 §556.56; 2.302, 2.325, 3.145, 3.148
 §556.62; 3.122
 §§556.101 to 556.106; 3.141, 3.142
 §557.1; 1.152, 1.175
 §558.13; 1.379
 §§560.1 to 560.79; 1.211
 §565.4; 1.156, 1.242
 §565.7; 1.373
 §606.4 (6); 1.628
 §§619.62 to 619.70; 1.283, 1.606, 1.607, 2.80
 §623.141; 1.335
 §629.54; 1.701
 §630.25; 1.325, 1.715
 §631.1; 1.202
 §633.19; 1.337
 §690.406; 1.242
 §702.1; 1.175
 §§702.45 to 702.48; 1.648, 3.352
 §702.80; 1.174
 §702.98; 1.209
 §750.177; 1.455

Statutes of Other Jurisdictions

Arizona suspension statutes; 3.4
 California Civil Code, §§763, 764 (1949); 1.85
 California suspension statutes; 3.4
 District of Columbia suspension statutes; 3.4

624 PERPETUITIES AND OTHER RESTRAINTS

Idaho suspension statutes; 3.4

Indiana Terr. Act Sep. 17, 1807, Laws Ind. Terr., p. 323; 1.34

Indiana suspension statutes; 3.4

Kentucky suspension statutes; 3.4

Massachusetts General Laws, c. 184 A (1954); 2.127

Minnesota suspension statutes; 3.4

Missouri Revised Statutes, 1949, §§453.090; 2.142

Montana Revised Code, 1935, §§6725, 6726; 1.85

Montana suspension statutes; 3.4

New York Laws, 1909, c. 52; 2.303, 3.228

New York Laws, 1945, c. 558; 2.493

New York Real Property Law, §32; 1.85

§42; 3.288

§57; 1.179

§61a; 2.493

§§96, 103; 3.28

§105; 1.609

§§149 to 153; 2.304, 3.147

§§178, 179; 2.303

New York Revised Statutes, 1829, pt. 2, c. 1, tit. 2, Art. 1; 2.178

§5; 1.633

§14; 3.3

§15; 1.591, 3.3

§§16 to 19; 3.3

§20; 3.3, 3.85

§§21, 23; 3.3

§24; 2.49, 2.178, 3.11, 3.20, 3.85

§35; 2.203, 3.17, 3.84

§37; 1.579, 1.585, 2.482

§§38 to 40; 2.482

§41; 3.3

New York Revised Statutes, 1829, pt. 2, c. 1, tit. 2, Art. 2

§45; 1.580, 1.583

§47; 1.580, 1.583, 1.588, 1.634

§55; 2.483, 3.203, 3.228

§57; 1.580, 1.583, 1.587, 1.595

§60; 1.580, 1.583, 1.587

§63; 1.580, 1.587, 1.590, 1.595, 1.620, 3.18, 3.203, 3.228

§64; 1.580, 1.583, 1.598

§65; 1.580, 1.583, 1.602, 1.609, 3.203

§68; 1.580, 1.583, 1.600

New York Revised Statutes, 1829, pt. 2, c. 1, tit. 2, Art. 3; 3.120

§§81 to 85; 2.304, 3.147

§§128, 129; 2.303, 3.146

New York Revised Statutes, 1829, pt. 2, c. 4, tit. 4

§§1, 2; 2.51, 3.7

New York Revised Statutes, 1829, pt. 3, c. 1, tit. 2, Art. 2

§§38, 39; 1.628

North Dakota Revised Code, 1943, §§47-0405, 47-0406; 1.85

North Dakota suspension statutes; 3.4

Northwest Terr. Act Jul. 14, 1795, Laws N. W. Terr. 175, 176, 1.34, 2.30

Oklahoma Statutes, 1941, tit. 60, §§24, 25; 1.85

Oklahoma suspension statutes; 3.4
 Roman Empire, Justinian's Novel 159; 1.65
 South Dakota Code, 1939, §§51.0405, 51.0406; 1.85
 South Dakota suspension statutes; 3.4
 Uniform Conditional Sales Act, §13; 1.458
 Wisconsin suspension statutes; 3.4

TABLE OF RESTATEMENT CITATIONS

[References are to footnotes. The number which precedes the decimal point indicates the part; the figure which follows the decimal point is the footnote number.]

Restatement of Property

Intro. Note to Div. III; 1.355
 Div. IV, Part I, Intro. Note; 2.1, 2.28, 2.36, 2.41
 Div. IV, Part II, Intro. Note; 1.285, 1.432
 Chapter 22, Intro. Note; 2.274, 2.275
 §24; 2.341
 §27; 1.178
 §124; 1.263, 1.283, 2.80
 §153; 1.370
 §154; 1.370, 1.371, 2.330, 2.331, 2.335, 2.336
 §155; 1.370
 §156; 2.150, 2.161, 2.166, 2.167, 2.168
 §157; 2.146, 2.154, 2.156, 2.157, 2.158, 2.160
 §158; 2.146, 2.161, 2.168
 §173; 1.199, 1.200
 §179; 2.80
 §228; 2.512
 §229; 2.512, 2.524
 §249; 2.273
 §251; 2.252, 2.274
 §§256 to 259; 2.244
 §261; 2.262, 2.263
 §274; 2.139
 §279; 2.271, 2.275
 §280; 2.269
 §287; 2.142
 §295; 2.276, 2.277, 2.278
 §296; 2.274
 §318; 2.329
 §319; 3.122
 §320; 3.122
 §335; 3.138, 3.139, 3.141
 §337; 3.136
 §338; 3.137
 §365; 2.525, 2.526
 §367; 3.125
 §370; 2.5, 2.42, 2.43, 2.62, 2.116, 2.118, 2.125, 2.127, 2.130, 2.131, 2.157,
 2.168, 2.171, 2.172, 2.173, 2.387, 2.514
 §371; 2.280, 2.514
 §372; 2.333, 2.338, 2.344, 2.358
 §373; 2.67, 2.70, 2.72, 2.73, 2.74, 2.75, 2.76, 2.77, 2.78, 3.156, 3.158, 3.277
 §374; 2.28, 2.63, 2.90, 2.91, 2.92, 2.94, 2.95, 2.107, 2.111, 2.117, 2.119,
 2.121, 2.125, 2.132, 2.134, 2.445
 §375; 2.267
 §376; 2.544, 2.545, 2.546

- §377; 2.138, 2.140
- §378; 2.430, 2.433
- §379; 2.444
- §380; 2.449, 2.450, 2.451
- §381; 2.433, 2.458
- §382; 2.329
- §383; 2.280
- §384; 2.280, 2.289, 2.290
- §385; 2.282
- §389; 2.283
- §390; 2.82, 2.295, 2.296, 2.297, 2.299
- §391; 2.82, 2.301, 2.321
- §392; 2.82, 2.300, 2.318, 2.322, 2.324
- §393; 1.230, 2.362, 2.364
- §394; 1.230, 2.359, 2.362, 2.634
- §395; 2.367, 2.368
- §396; 2.390
- §397; 1.225, 2.391
- §398; 2.433
- §400; 2.385
- §401; 2.360, 2.361
- §402; 2.519, 2.524, 2.529, 2.543, 2.544, 2.560
- §403; 2.520, 2.521, 2.522, 2.523, 2.524, 2.525, 2.526
- §404; 1.107
- §405; 1.107, 1.245, 1.298, 1.345, 1.369, 1.370
- §406; 1.129, 1.130, 1.131, 1.168, 1.169, 1.177, 1.178, 2.513
- §407; 1.129, 1.154, 1.370
- §408; 1.76
- §409; 1.254, 1.255, 1.273
- §410; 1.305, 1.341
- §411; 1.154, 1.369, 1.370
- §412; 1.199
- §413; 1.226, 1.227
- §415; 1.689
- §416; 1.721
- §424; 1.391, 2.515
- §§425 to 427; 1.391
- §428; 1.285, 1.391
- §§429, 433; 1.391
- §437; 1.285
- §439; 2.472, 2.473, 2.474
- §441; 2.500
- §442; 2.481
- §445; 2.493
- §489; 1.305
- §513; 2.385
- Appendix, Chapter A; 3.4, 3.128
 - ¶10; 3.77, 3.78, 3.80
 - ¶11; 2.50
 - ¶12; 2.370, 3.106
 - ¶14; 3.36, 3.155, 3.171, 3.279
 - ¶17; 3.18, 3.205, 3.210

¶18; 3.208
 ¶19; 3.186
 ¶20; 3.155, 3.159, 3.179, 3.185, 3.200, 3.279
 ¶22; 3.43
 ¶23; 3.52
 ¶24; 3.58, 3.74, 3.75
 ¶25; 3.65, 3.67
 ¶26; 3.47, 3.70
 ¶29; 3.38, 3.275
 ¶30; 3.38, 3.152, 3.276, 3.279
 ¶31; 3.38, 3.271, 3.273
 ¶32; 3.38, 3.271, 3.272
 ¶33; 3.221, 3.360
 ¶37; 3.289
 ¶39; 2.542, 2.564, 3.306, 3.360
 ¶40; 2.542, 2.564, 3.118, 3.360
 ¶¶41, 42; 2.542, 3.360
 ¶43; 2.542, 3.359, 3.360
 ¶¶44, 45; 2.542, 3.360
 ¶46; 3.360
 ¶¶47 to 52; 3.221, 3.360
 ¶53; 2.224
 ¶58; 2.302
 ¶59; 3.295
 ¶61; 3.367
 ¶62; 3.369
 ¶64; 2.566, 3.373
 ¶66; 3.274
 ¶67; 3.378
 ¶70; 3.118

Appendix, Chapter B; 3.4

¶3; 2.50
 ¶5; 2.52
 ¶50; 2.52, 3.1
 ¶51; 2.59, 3.1, 3.174, 3.197
 ¶52; 2.53, 2.553, 3.1
 ¶53; 2.49, 2.370, 3.1, 3.85, 3.90, 3.166
 ¶54; 3.1, 3.307, 3.337
 ¶55; 3.1, 3.114
 ¶56; 2.56, 2.58, 3.1, 3.38, 3.186, 3.190, 3.196, 3.274, 3.275, 3.276,
 3.289, 3.295, 3.373, 3.378
 ¶57; 3.1, 3.370
 ¶¶58, 85; 3.1

Restatement of Trusts

§10; 3.232
 §62; 1.595, 2.387, 2.458
 §65; 2.387
 §112; 2.388, 2.395, 2.418, 2.419
 §119; 2.448
 §124; 2.439, 2.444
 §150; 1.567
 §151; 1.572

§152; 1.569
§153; 1.572
§154; 1.570
§156; 1.574
§157; 1.573
§167; 1.610
§§202, 205, 208; 1.566
§216; 1.566
§283; 1.562
§284; 1.565
§287; 1.565
§288; 1.563
§289; 1.564
§337; 1.615, 2.455
§338; 1.618
§340; 2.139
§364; 2.395, 2.419
§365; 2.395, 2.433
§374; 2.441
§397; 2.401
§398; 2.544
§401; 2.390, 2.391

TABLE OF PERIODICAL CITATIONS

[References are to footnotes. The number which precedes the decimal point indicates the part; the figure which follows the decimal point is the footnote number.]

- Ames, "Origin of Uses and Trusts," 21 Harv. L. Rev. 261 (1908); 1.10, 1.17, 1.535, 1.545
- Ball, "Release of Powers of Appointment for Federal Estate Tax Purposes," 4 Ark. L. Rev. 66 (1949-50); 3.139
- Beals, "Estates Tail in Kansas," 1 J. Bar A. Kan. 203 (1933); 1.100
- Bettner, "The Rule Against Perpetuities as Applied to Powers of Appointment," 27 Va. L. Rev. 149 (1940); 2.295, 2.304, 2.305, 3.148
- Blackwell, "The Charitable Corporation and the Charitable Trust," 24 Wash. Univ. L. Quar. Rev. 1 (1938); 1.221
- Bordwell, "Alienability and Perpetuities," 24 Iowa L. Rev. 1 (1938); 1.68, 1.76, 1.102, 1.115, 1.219, 1.252, 1.259, 1.263, 2.13
- Bordwell, "Interests in Chattels Real and Personal," 1 Mo. L. Rev. 119 (1936); 1.353, 1.421, 1.428, 1.429
- Brake, "Satisfying Michigan's Perpetuity Rules," 5 Univ. of Detroit L. J. 160 (1942); 3.1, 3.25, 3.90
- Brake, "The 'Vested vs. Contingent' Approach to Future Interests: A Critical Analysis of the Michigan Cases," 9 Univ. of Detroit L. J. 61 (1946); 2.184
- Browder, "Illegal Conditions and Limitations: Effect of Illegality," 47 Mich. L. Rev. 759 (1949); 1.391
- Brown, "Ecclesiastical Origin of the Use," 10 Notre Dame Lawyer 353 (1935); 1.10, 1.535
- Brownell, "Duration of Indestructible and Spendthrift Trusts," 23 Corn. L. Q. 629 (1938); 2.461
- Chafee, "Equitable Servitudes on Chattels," 41 Harv. L. Rev. 945 (1928); 1.483
- Clark, "Unenforcible Trusts and the Rule Against Perpetuities," 10 Mich. L. Rev. 31 (1911); 2.92
- Costigan, "Equitable Fee Tail Estates—Illinois Fee Tail Statute—Shall Equity Follow the Law," 5 Ill. L. Rev. 514 (1911); 1.100
- Danahey, "The Confusing Right of Survivorship," 32 Mich. St. Bar J. 14 (Feb. 1953); 1.167, 3.317
- "Estates Tail in the United States," 15 Col. L. Rev. 618 (1915); 1.100
- "Estates Tail in the United States," 24 Harv. L. Rev. 144 (1910); 1.93
- Foulke, "Powers and the Rule Against Perpetuities," 16 Col. L. Rev. 537 (1916); 2.295, 2.322, 2.356
- Fratcher, "Defeasance as a Restrictive Device in Michigan," 52 Mich. L. Rev. 505 (1954); 1.144, 1.299
- Fratcher, "Trustor as Sole Trustee and Only Ascertainable Beneficiary," 47 Mich. L. Rev. 907 (1949); 1.27, 1.58

- Goddard, "Non-Assignment Provisions in Land Contracts," 31 Mich. L. Rev. 1 (1932); 1.690, 1.719, 1.720
- Goddard, "Perpetuity Statutes: Some Reform Statutes in Need of Reformation," 22 Mich. L. Rev. 95 (1923); 3.2
- Grismore, "Effect of a Restriction on Assignment in a Contract," 31 Mich. L. Rev. 299 (1933); 1.524, 1.719
- Herbruck, "Forestalling, Regrating and Engrossing," 27 Mich. L. Rev. 365 (1929); 1.463, 1.468, 1.473, 1.474
- Holmestead, "Estates Tail," 22 Can. L. T. 426 (1902); 1.100
- Hudson, "Estates Tail in Missouri," 7 Ill. L. Rev. 355 (1913); 1.100
- Leach, "Perpetuities in Perspective," 65 Harv. L. Rev. 721 (1952); 2.127, 2.143
- Leach, "The Rule Against Perpetuities and Gifts to Classes," 51 Harv. L. Rev. 1329 (1938); 2.280
- Leach, "Perpetuities Legislation, Massachusetts Style," 67 Harv. L. Rev. 1349 (1954); 2.127
- Long, "Perpetuities and Accumulations: Recent Legislative Acts Explained," 17 Detroit Lawyer 193 (1949); 2.502, 2.507, 3.3
- Lundberg, "Barring of Entails, Its Marks on Our Land Laws," 3 Dakota L. Rev. 160 (1930); 1.100
- Manning, "The Development of Restraints on Alienation Since Gray," 48 Harv. L. Rev. 373 (1935); 1.107, 1.109, 1.117, 1.128, 1.198, 1.245, 1.253, 1.255, 1.432
- Montague, "Business Enterprise and the Law," 193 N. Am. Rev. 694 (1910); 1.487
- Murray, "The Rule Against Prolonged Indestructibility of Private Trusts," 44 Ill. L. Rev. 467 (1949); 2.451, 2.461
- Morris, "Uterior Limitations and the Rule Against Perpetuities," 10 Camb. L. J. 392 (1950); 2.560
- Morris, "Primogeniture and Entailed Estates in America," 27 Col. L. Rev. 24 (1927); 1.100
- Oliver, "Interests for Life and Quasi-Remainders in Chattels Personal," 24 L. Q. Rev. 431 (1908); 1.415, 1.421
- Redfearn, "Estates Tail in Florida," 6 Fla. L. J. 69 (1932); 1.100
- Report of the Committee on Legislation and Law Reform, 17 Mich. St. Bar J. 393 (1938); 3.2
- Report of Committee on Revision of the Michigan Perpetuity Statutes, 10 Mich. St. Bar J. 20 (1930); 3.2
- Roberts, "Transfer of Future Interests," 30 Mich. L. Rev. 349 (1932); 1.396
- Rundell, "The Suspension of the Absolute Power of Alienation," 19 Mich. L. Rev. 235 (1921); 3.18, 3.20, 3.21
- Sanger, "Estates Tail Under the New Law," 2 Camb. L. J. 212 (1925); 1.100
- Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 Yale L. J. 961 (1935); 1.107, 1.109, 1.117, 1.128, 1.177, 1.178, 1.185, 1.198, 1.229, 1.245, 1.253, 1.298, 1.304, 1.367, 1.432

- Sherrard, "Perpetuities in Michigan Today," 29 Mich. St. Bar. J. 5 (Mar. 1950); 3.3
- Simes, "Future Interests in Chattels Personal," 39 Yale L. J. 771 (1930); 1.421, 1.429, 1.430, 1.431
- Simes, "Is the Rule Against Perpetuities Doomed? The 'Wait and See' Doctrine," 52 Mich. L. Rev. 179 (1953); 2.127
- Simes, "Statutory Restrictions on the Accumulation of Income," 7 Univ. of Chicago L. Rev. 409 (1940); 2.474, 2.480
- Simes, "The Devolution of Title to Appointed Property," 22 Ill. L. Rev. 480 (1928); 2.295, 2.304, 2.324, 2.327, 3.147
- Simes, "Powers in Trust and the Termination of Powers by the Donee," 37 Yale L. J. 63 (1927); 3.125, 3.138, 3.139
- Smith, "Honorary Trusts and the Rule Against Perpetuities," 30 Col. L. Rev. 60 (1930); 2.444
- Steiner, "Estates Tail in Missouri," 7 Kansas City L. Rev. 93 (1939); 1.100
- Sweet, "Perpetuities," 15 L. Q. R. 71 (1899); 2.2
- Sweet, "Restraints on Alienation," 33 L. Q. Rev. 236 (1917); 1.111, 1.117, 1.128, 1.244, 1.252, 1.303, 1.367
- Sweet, "The 'Easement' of Tunnelling," 32 L. Q. R. 74 (1916); 2.352
- Sweet, "The Monstrous Regiment of the Rule Against Perpetuities," 18 Jurid. Rev. 132 (1906); 2.127
- Tripp, "The Michigan 'Two Lives' Rule," 28 Mich. St. Bar J. 17 (Mar. 1949); 3.2
- Turner, "Estates Tail in Kansas," 2 J. Bar A. Kan. 241 (1934); 1.100
- Updegraff, "The Interpretation of 'Issue' in the Statute De Donis," 39 Harv. L. Rev. 200 (1925); 1.64
- Waite, "Public Policy and Personal Opinion," 19 Mich. L. Rev. 265 (1921); 1.483, 1.490
- Waterbury, "Some Recent Statutory Changes in the Law of Perpetuities," 48 Mich. L. Rev. 158 (1950); 3.3
- Wolfe, "Rules Against Perpetuities and Gifts to Charity," 17 Ind. L. J. 205 (1942); 2.433

Please note that the following Table of Cases and Index are from the original text, which has missing pages and pages out of order.

University of Michigan Law Library

TABLE OF CASES

665

	PAGE		PAGE
N.E. 911, 159 N.E. 646 (1927), cert. den., 276 U.S. 603 (1928) . . . 401, 514		Oades v. Standard Savings & Loan Assn., 257 Mich. 469, 241 N.W. 262 (1932) 147	
Nicholl v. Nicholl, 2 Black. W. 1159, 96 Eng. Rep. 683 (1777) 449		Oakland, County of v. Mack, 243 Mich. 279, 220 N.W. 801 (1928) . . 85, 145, 239, 391	
Nicholls v. Sheffield, 2 Bro. C. C. 215, 29 Eng. Rep. 121 (1787) 281		Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 57 S. Ct. 139 (1936) . . 185, 194	
Niles v. Mason, 126 Mich. 482, 85 N.W. 1100 (1901) 231, 278, 450, 458, 460, 470, 546, 548, 553, 561, 568, 573, 580, 586, 592, 602, 604, 608		Oliver v. Wells, 254 N.Y. 451, 173 N.E. 676 (1930) 603	
Noel v. Jevon, 2 Freeman 43, 22 Eng. Rep. 1047 (1678) 204		Olson v. Sash, 217 Mich. 604, 187 N.W. 346 (1922) 401	
North v. Way, 1 Vern. 13, 23 Eng. Rep. 270, sub nom. North v. Williams, 2 Ch. Ca. 63, 22 Eng. Rep. 848 (1681) . . . 23, 267		Orby v. Trigg, 9 Mod. 2, 88 Eng. Rep. 276, 2 Eq. Cas. Abr. 599, 22 Eng. Rep. 503 (1722) 246	
Northwest Civic Associa- tion v. Sheldon, 317 Mich. 416, 27 N.W. (2d) 36 (1947) 61		Ord v. Smith, 2 Eq. Cas. Abr. 600, 22 Eng. Rep. 504 (1725) 246	
Nowicki v. Kopelczak, 195 Mich. 678, 162 N.W. 266 (1917) 403		Ostrander v. Muskegon Fi- nance Co., 230 Mich. 310, 202 N.W. 951 (1925) 346, 375	
Nusbaum v. Shapero, 249 Mich. 252, 228 N.W. 785 (1930) 251		Otis v. Arntz, 198 Mich. 196, 164 N.W. 498 (1917) 218, 277, 300, 413, 451, 462, 473, 505, 553, 561, 609	
Nu-Way Service Stations, Inc. v. Vandenberg Oil Co., 283 Mich. 551, 278 N.W. 683 (1938) . . 89, 403		O'Toole & Nedean Co. v. Boelkins, 254 Mich. 44, 235 N.W. 820 (1931) . . 402	
		Owen v. Yale, 75 Mich. 256, 42 N.W. 817 (1889) 147	

	PAGE		PAGE
Packard v. Kingman, 109 Mich. 497, 67 N.W. 551 (1896)	229	Paschall v. Keterich, 2 Dyer 151b, 73 Eng. Rep. 330 (1557)	113
Paine v. Meller, 6 Ves. Jr. 349, 31 Eng. Rep. 1088 (1801)	248	Paton v. Langley, 50 Mich. 428, 15 N.W. 537 (1883)	505, 576, 579
Palmolive Co., Ltd. v. Freedman, [1928] Ch. 264 (C.A.)	182	Patterson v. Butterfield, 244 Mich. 330, 221 N.W. 293 (1928)	117
Palms v. Palms, 68 Mich. 355, 36 N.W. 419 (1888)	218, 227, 231, 276, 277, 278, 293, 409, 439, 455, 466, 470, 508, 546, 553, 576, 577, 592, 608	Patterson v. Carrel, 171 Mich. 296, 137 N.W. 158 (1912)	129, 146
Paramour v. Yardley, 2 Plowd. 539, 75 Eng. Rep. 794 (1578)	160	Patterson's Estate, In re, 227 Mich. 486, 198 N.W. 958 (1924)	352, 360
John D. Park & Sons Co. v. Hartman, (6th Cir. 1907) 153 F. 24 ...	184, 188	Pearson v. Sullivan, 209 Mich. 306, 176 N.W. 597 (1920)	129
Parkhurst v. Smith ex dem. Dormer, 6 Brown 351, 2 Eng. Rep. 1127 (1740)	265, 266	Peck v. Cardwell, 2 Beav. 137, 48 Eng. Rep. 1131 (1839)	75
Parkinson v. Parkinson, 139 Mich. 530, 102 N.W. 1002 (1905)	472	Peck Estates, In re, 320 Mich. 692, 32 N.W. (2d) 14 (1948)	237, 380, 384, 443, 531
Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922)	61	Peel's Release, Re, [1921] 2 Ch. 218	391
Parry v. Herbert, 4 Leon. 5, 74 Eng. Rep. 688 (1576)	114	Pell and Browne's Case, 2 Roll. Rep. 216, 81 Eng. Rep. 760 (1620)	261
Partridge v. Strange, 1 Plowden 77, 75 Eng. Rep. 123 (1552)	140	Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (1620)	268, 318
		Pembroke, Earl of v. Zouch, Tothill 130, 21 Eng. Rep. 145 (1631) ..	159

TABLE OF CASES

667

	PAGE		PAGE
Penhay v. Hurrell, 2 Vern.		Peters v. Fowler, 202 Mich.	
370, 23 Eng. Rep. 834		695, 168 N.W. 966	
(1702)	266	(1918)	419, 425
Peninsular Savings Bank		Peters v. Heyward, Cro.	
v. Union Trust Co., 127		Jac. 682, 79 Eng. Rep.	
Mich. 355, 86 N.W. 798		591 (1624)	157
(1901)	229	Petit v. Flint & Pere Mar-	
Penny v. Croul, 76 Mich.		quette R.R. Co., 114	
471, 43 N.W. 649		Mich. 362, 72 N.W. 238	
(1889)	84, 231, 276,	(1897)	450
278, 413, 415, 417, 423, 547		Pettingall v. Pettingall, 11	
Penny v. Mayer, 279 Mich.		L.J. Ch. 176 (1842)	423
400, 272 N.W. 721		Phelps v. Pipher, 320	
(1937)	354	Mich. 663, 31 N.W. (2d)	
People v. Beaubien, 2		836 (1948)	74
Dougl. 256 (Mich. 1846)	391	Phillips v. Vaughan, 1	
People's Trust Co. v.		Vern. 336, 23 Eng. Rep.	
Flynn, 106 App. Div.		504 (1685)	246
78, 94 N.Y. Supp. 436		Pickard v. Kleis, 56 Mich.	
(1905)	555, 587	604, 23 N.W. 329 (1885)	403
People, ex rel. Attorney-		Pierce v. Win, 1 Vent.	
General v. Detroit		321, 86 Eng. Rep. 208	
Asphalt Paving Co., 244		(1677)	26
Mich. 119, 221 N.W. 122		Pills v. Brown, Palm. 131,	
(1928)	193	81 Eng. Rep. 1012	
Perkins, Matter of, 245		(1620)	261
N.Y. 478, 157 N.E. 750		Pilsbury's Will, In re, 50	
(1927)	540	Misc. 367, 113 App. Div.	
Perrin v. Lepper, 34 Mich.		893, 99 N.Y. Supp. 62,	
292 (1876)	2	aff'd, 186 N.Y. 545, 79	
Perrot's Case, Moore 368,		N.E. 1114 (1906) ..	379, 383
72 Eng. Rep. 634 (1594)	264	Plant v. Weeks, 39 Mich.	
Peschale v. Fitz Aucher,		117 (1878)	343, 359
Bract. N.B. pl. 533		Plesyngton's Case, Bellewe	
(1231)	2, 140	101, 72 Eng. Rep. 43	
Peters v. Canfield, 74		(1382)	142
Mich. 498, 42 N.W. 125			
(1889)	252		

	PAGE		PAGE
Plucknet v. Kirk, 1 Vern.		Potter v. North, 1 Lev.	
411, 23 Eng. Rep. 551		268, 83 Eng. Rep. 400	
(1686)	245	(1669)	394
Polczynski v. Nowicki, 227		Powell v. Boggis, 35 Beav.	
Mich. 415, 198 N.W. 976		535, 55 Eng. Rep. 1004	
(1924)	403	(1886)	163
Poole v. Union Trust Co.,		Powell's Trusts, In re, 39	
191 Mich. 162, 157 N.W.		L.J. Ch. 188 (1869) . . .	383
430 (1916)	439	Pownall v. Graham, 33	
Poole's Case, cited in Tat-		Beav. 242, 55 Eng. Rep.	
ton v. Mollineux, Moore		360 (1863)	300
K.B. 809, 72 Eng. Rep.		Proctor v. Bishop of Bath	
920 (1610)	26	and Wells, 2 H. Bl. 538,	
Portage Grange No. 16 v.		126 Eng. Rep. 594	
Portage Lodge No. 340,		(1794)	463
141 Mich. 402, 104 N.W.		Proprietors of the Church	
667 (1905) . . . 64, 150, 153		in Brattle Square v.	
Porter v. Barrett, 233		Grant, 3 Gray (69	
Mich. 373, 206 N.W.		Mass.) 142 (1855)	452
532, 42 A.L.R. 1267		Puffer v. Clark, 202 Mich.	
(1925)	59-61, 62,	169, 168 N.W. 471	
.	83, 254, 392, 488	(1918)	392, 413
Porter v. Osmun, 135		Purdy v. Hayt, 92 N.Y.	
Mich. 361, 97 N.W. 756		446 (1883)	499, 503
(1904)	336, 359, 360	Purefoy v. Rogers, 2 Wms.	
Porter v. Porter, 50 Mich.		Saund. 380, 85 Eng.	
456, 15 N.W. 550 (1883)	352,	Rep. 1181 (1671) . . .	263, 267
.	360	Pusey v. Pusey, 1 Vern. 273	
Portington's Case, 10 Co.		23 Eng. Rep. 465 (1684)	157
Rep. 35b, 77 Eng. Rep.		Pye v. Gorge, 1 P. Wms.	
976 (1613)	26, 39, 260	128, 24 Eng. Rep. 323	
Portman v. Viscount Port-		(1710), aff'd sub nom.	
man, [1922] 2 A.C. 473		Gorges v. Pye, 7 Brown	
(H.L.)	281	221, 3 Eng. Rep. 144	
Post v. Grand Rapids		(1712)	203, 266
Trust Co., 255 Mich.		Quarm v. Quarm, [1892] 1	
436, 238 N.W. 206		Q.B. 184 (C.A.)	316
(1931) . . . 295, 438, 441, 446			

	PAGE		PAGE
Quarton v. Barton, 249 Mich. 474, 299 N.W. 465 (1930)	71	Read v. Kearsley, 14 Mich. 215 (1866)	12
Quency v. Prior of Barnwell, Bract. N.B. pl. 999 (1224)	9, 199	Redington v. Browne, 32 L.R. (Ir.) 347 (1893)...	312
Quinn v. Pere Marquette Ry. Co., 256 Mich. 143, 239 N.W. 376 (1931) ..	145, 146, 392	Reed v. Bond, 96 Mich. 134, 55 N.W. 619 (1893)	397
Radley v. Kuhn, 97 N.Y. 26 (1884)	555	Reeve v. Long, 1 Salk. 227, 91 Eng. Rep. 202 (1694)	262, 266, 270
Randall v. Chubb, 46 Mich. 311, 9 N.W. 429 (1881)	118	Regina v. East London Waterworks, 18 Q.B. 705, 118 Eng. Rep. 266 (1852)	394
Randall v. Higbee, 37 Mich. 40 (1877)	251	Reilly v. Booth, 44 Ch. D. 12 (C.A. 1889)	394
Randall v. Randall, 37 Mich. 563 (1877)	147	Reilly v. Otto, 108 Mich. 330, 66 N.W. 228 (1896)	392
Range v. Davison, 242 Mich. 73, 218 N.W. 789 (1928)	252	Reserve Loan Life Ins. Co. v. Witt, 264 Mich. 536, 250 N.W. 301 (1933) ..	251
Rashken v. Smith, 236 Mich. 440, 210 N.W. 485 (1927)	402	Reynolds v. McMullen, 55 Mich. 568, 222 N.W. 41 (1885)	13, 270
Rathbun v. Herche, 323 Mich. 160, 35 N.W. (2d) 230 (1948)	252	Rex v. Bath, 14 East 609, 104 Eng. Rep. 736 (1811)	394
Rawlyns's Case, 4 Co. Rep. 52a, 76 Eng. Rep. 1007 (1587)	140	Rex v. Bell, 7 T.R. 598, 101 Eng. Rep. 1152 (1798)	394
Raynor v. Lee, 20 Mich. 384 (1870)	147	Rex v. Birmingham Gas-Light & Coke Co., 1 B. & C. 506, 107 Eng. Rep. 187 (1823)	394
Read v. Erington, Cro. Eliz. 321, 78 Eng. Rep. 571 (1594)	19, 112	Rex v. Brighton Gas Light & Coke Co., 5 B. & C. 466, 108 Eng. Rep. 173 (1826)	394

	PAGE		PAGE
Rex v. Chelsea Water Works, 5 B. & Ad. 156, 110 Eng. Rep. 750 (1833)	394	Robinson v. Finch, 116 Mich. 180, 74 N.W. 472 (1898)	72
Rex v. Rochdale Waterworks, 1 M. & S. 634, 105 Eng. Rep. 237 (1913) ..	394	John Robinson Hospital v. Cross, 279 Mich. 407, 272 N.W. 724 (1937)...	419
Rex Oil & Gas Company v. Busk, 335 Mich. 368, 56 N.W. (2d) 221 (1953) ..	406	Rochford v. Hackman, 9 Hare 475, 68 Eng. Rep. 597 (1852)	94
Rhines v. Consumers' Power Co., 259 Mich. 236, 242 N.W. 898 (1932)	392	Rodenhouse v. De Golia, 198 Mich. 402, 164 N.W. 488 (1917)	253
Rhoades v. Davis, 51 Mich. 306, 16 N.W. 659 (1883)	147	Rodey v. Stotz, 280 Mich. 90, 273 N.W. 404 (1937)	276, 277, 330, 358, 360, 506, 512
Rhodes v. Bouldry, 138 Mich. 144, 101 N.W. 206 (1904)	30, 32	Roe ex dem. Hunter v. Galliers, 2 T.R. 133, 100 Eng. Rep. 72 (1787) ..	95
Richards' Estate, In re, 283 Mich. 485, 278 N.W. 657 (1938)	218, 277, 278, 451, 466, 467, 505, 546, 548, 553, 609	.....	114
Richmond v. Robinson, 12 Mich. 193 (1864)	147	Roe ex dem. Perry v. Jones, 1 H. Bl. 30, 126 Eng. Rep. 20 (1788)....	141
Ridley, In re, 11 Ch. D. 645 (1879)	427, 431	Rood v. Hovey, 50 Mich. 395, 15 N.W. 525 (1883)	333, 339, 345, 352, 360
Rider v. Ford, [1923] 1 Ch. 541	399	Root v. Snyder, 161 Mich. 200, 126 N.W. 206 (1910) ..	499, 587, 592, 602
Rishton v. Cobb, 5 Myl. & Cr. 145, 41 Eng. Rep. 326 (1839)	163	Rose v. Southern Michigan National Bank, 255 Mich. 275, 238 N.W. 284 (1931)	233, 430, 488
Robert v. Corning, 89 N.Y. 225 (1882)	541, 542	Rose v. Southern Michigan National Bank, 328 Mich. 639, 44 N.W. (2d) 192 (1950)	74
Roberts v. Michigan Trust Co., 273 Mich. 91, 262 N.W. 744 (1935) 236, 488-89			

TABLE OF CASES

671

PAGE	PAGE
Rosenthal v. Shapiro, 333 Mich. 302, 52 N.W. (2d) 859 (1952)	403, 404
Rosher, In re, [1884] 26 Ch. Div. 801	41, 45, 46, 87
Rothanhale v. Wyehing-ham, 2 Cal. Proc. Ch. iii (1413-1422)	4, 201
Rous v. Jackson, 29 Ch. D. 521 (1885)	384
Routledge v. Dorril, 2 Ves. Jr. 357, 30 Eng. Rep. 671 (1794)	363, 376, 385
Rowerdink, v. Carothers, 334 Mich. 454, 54 N.W. (2d) 715 (1952)	63
Rozell v. Rozell, 217 Mich. 324, 186 N.W. 489 (1922)	311, 357, 361, 362, 363, 451, 455, 491, 495, 497, 503, 505, 573, 577, 579
Ruch v. Ruch, 159 Mich. 231, 124 N.W. 52 (1909)	74
Ruddall v. Miller, 1 Leon. 298, 74 Eng. Rep. 271 (1586)	95
R u d h a l l v. Milward, Moore K.B. 212, 72 Eng. Rep. 537, sub nom. Rud-dall v. Miller, 1 Leon. 298, 74 Eng. Rep. 271 (1586)	25
Russell v. Musson, 240 Mich. 631, 216 N.W. 428 (1927)	144, 275, 310, 359, 499, 505, 511, 558, 567
Rutherford, Sender & Co. v. Goldthorpe, Scott & Wright, Ltd., [1922] 1 K.B. 508	171
Ryder v. Flanders, 30 Mich. 336 (1874)	103, 333
Saari v. Silvers, 319 Mich. 591, 30 N.W. (2d) 286 (1948)	61
Saffyn's Case, 5 Co. Rep. 123b, 77 Eng. Rep. 248, sub nom. Saffyn v. Adams, Cro. Jac. 60, 79 Eng. Rep. 50 (1605)	138-39, 140
Sage v. Sage, 230 Mich. 477, 203 N.W. 90 (1925)	74
St. Amour v. Rivard, 2 Mich. 294 (1852)	99, 100, 272, 287, 296, 298, 299, 326, 363, 437, 446, 449, 457, 608
St. Paul's Church v. Attor-ney-General, 164 Mass. 188, 41 N.E. 231 (1895)	435
Sambach v. Dalston, Tot-hill 188, 21 Eng. Rep. 164 (1634)	5, 202
Sanders v. Cornish, Cro. Car. 230, 79 Eng. Rep. 801 (1631)	27, 267
Saunders v. Dehew, 2 Vern. 271, 23 Eng. Rep. 775 (1692)	203
Saunders v. Vautier, Cr. & Ph. 240, 41 Eng. Rep. 482 (1841)	426, 434

	PAGE		PAGE
Scarney v. Clarke, 282		341 U.S. 384, 71 S. Ct.	
Mich. 56, 275 N.W. 765		745 (1951)	185, 186
(1937)	419-20	Schwegmann Bros. Giant	
Scheibner v. Scheibner,		Super Markets v. Eli	
199 Mich. 630, 165 N.W.		Lilly & Co., 205 F. (2d)	
660 (1917)	218, 277,	788 (5th Cir. 1953), cert.	
474, 552, 564, 567, 573, 610		den. 74 S. Ct. 71 (1953). 186	
Schenck v. Barnes, 156		James E. Scripps Corpora-	
N.Y. 316, 50 N.E. 967		tion v. Parkinson, 186	
(1898)	227, 229, 568	Mich. 663, 153 N.W. 29	
Schettler v. Smith, 41 N.Y.		(1915)	451, 472,
328 (1869)	573	. . . . .	552, 553, 609
Schiffer v. Brenton, 247		Scudder v. Security Trust	
Mich. 512, 226 N.W. 253		Co., 238 Mich. 318, 213	
(1929)	309	N.W. 131 (1927)	218,
Schilling, In re Estate of,		. . . . .	419, 420
102 Mich. 612, <i>sub nom.</i>		Sears v. Coolidge, 329	
Moore v. Schindehette,		Mass. 340, 108 N.E. (2d)	
61 N.W. 62 (1894)	57,	563 (1952)	371
.	79, 488	See v. Derr, 57 Mich. 369,	
School District No. 5 of		24 N.W. 108 (1885)	336,
Delhi v. Everett, 52		. . . . .	337, 359, 361
Mich. 314, 17 N.W. 926		Sellick v. Sellick, 207	
(1883)	146, 390	Mich. 194, 173 N.W. 609	
Schreyer v. Schreyer, 101		(1919)	164
App. Div. 456, 91 N. Y.		Selwyn v. Selwyn, 2 Burr.	
Supp. 1065 (1905), <i>aff'd</i> ,		1131, 97 Eng. Rep. 750	
182 N.Y. 555, 75 N.E.		(1761)	141
1134 (1905)	535	Seton v. Slade, 7 Ves. Jr.	
Schulte v. Starks, 238		265, 32 Eng. Rep. 108	
Mich. 102, 213 N.W. 102		(1802)	248, 249
(1927)	61	Edward Seymour's Case, 10	
Schultz v. Brohl, 116 Mich.		Co. Rep. 95b, 77 Eng.	
603, 74 N.W. 1012		Rep. 1074 (1612)	261
(1898)	63	Shailard v. Baker, Cro.	
Schwegmann Brothers v.		Eliz. 744, 78 Eng. Rep.	
Calvert Distillers Corp.,		977 (1600)	40, 42

	PAGE		PAGE
Shakespeare Company v. Lippman's Tool Shop Sporting Goods Com- pany, 334 Mich. 109, 54 N.W. (2d) 268 (1952) ..	194	Smith v. Bonhoof, 2 Mich. 116 (1851) 414, 417, 422, 425	
Sharington v. Minors, Moore KB. 543, 72 Eng. Rep. 746 (1599)	25, 95	Smith v. Day, 2 M. & W. 684, 150 Eng. Rep. 931 (1837)	312
Shelley's Case, 1 Co. Rep. 93b, 76 Eng. Rep. 206 (1581)	19	Smith v. Jackman, 115 Mich. 192, 73 N.W. 228 (1897)	345
Shumway's Estate, In re, 194 Mich. 245, 160 N.W. 595 (1916)	359	Smith v. Sherman, 265 Mich. 590, 251 N.W. 920 (1933)	251
Silvester's Case, Poph. 148, 79 Eng. Rep. 1248 (1619)	73	Smith v. Smith, 71 Mich. 633, 40 N.W. 21 (1888). 63, 64, 76, 488	55
Sipes v. McGhee, 316 Mich. 614, 25 N.W. (2d) 638 (1947), rev'd, Mc- Ghee v. Sipes, 334 U.S. 1, 68 S. Ct. 836 (1948) ..	61	Smith v. Thompson, 250 Mich. 302, 230 N.W. 156 (1930)	74
Skinner v. Taft, 140 Mich. 282, 103 N.W. 702 (1905)	302, 307, 346, 546, 562, 567, 609	Smith ex dem. Dormer v. Packhurst, 3 Atk. 135, 26 Eng. Rep. 881 (1742) 312, 313, 314, 315	
Sloman v. Cutler, 258 Mich. 372, 242 N.W. 735 (1932)	62, 255	Snane v. Rumenal, Bract. N.B., pl. 1140 (1235) ..	111, 157
Smith v. Applebaum, 241 Mich. 493, 217 N.W. 401 (1928)	122, 135, 389	Snyder v. Potter, 328 Mich. 236, 43 N.W. (2d) 922 (1950)	451, 472, 475, 567, 601
Smith v. Barrie, 56 Mich. 314, 22 N.W. 816 (1885)	53	Soley's Estate, In re, 150 Misc. 839, 271 N.Y. Supp. 595 (1934)	499
..... 88, 192, 392, 397		Somerset, Duke of v. Cook- son, 3 P. Wms. 390, 24 Eng. Rep. 1114 (1735) ..	157
Smith v. Belay, Cro. Eliz. 630, 78 Eng. Rep. 870 (1597)	267	Somerville v. Lethbridge, 6 T.R. 213, 101 Eng. Rep. 517 (1795)	322
		Sommers v. Reynolds, 103	

	PAGE		PAGE
Mich. 307, 61 N.W. 501		Eng. Rep. 111 (1750)	318-19
(1894)	122	Stahl v. Dehn, 72 Mich.	
Sonday's Case, 9 Co. Rep.		645, 40 N.W. 922 (1888)	397
127b, 77 Eng. Rep. 915		Stanton v. Loranger, 1	
(1611)	26	Trans. Sup. Ct. Terr.	
Soulle v. Gerrard, Cro.		Mich. 1825-1836, 282	
Eliz. 525, 78 Eng. Rep.		(1825)	13
773 (1595)	322	Star v. Anonymous, Y.B.	
Lord Southampton v. Mar-		15 Edw. II, Hil., ff. 458	
quis of Hertford, 2 V. &		(1321)	111
B. 54, 35 Eng. Rep. 239		Starkey v. Horton, 65	
(1813)	433	Mich. 96, 31 N.W. 626	
Spencer's Case, 5 Co. Rep.		(1887)	403
16a, 77 Eng. Rep. 72		Starr v. Holck, 318 Mich.	
(1583)	183	452, 28 N.W. (2d) 289	
Spittle v. Davie, 2 Leon.		(1947)	403
38, 74 Eng. Rep. 339		State v. Dunbar Estate, 99	
(1588)	25, 26	Mich. 99, 57 N.W. 1103	
Spitzer v. Spitzer, 38 App.		(1894)	165
Div. 436, 56 N.Y. Supp.		State v. Holmes, 115 Mich.	
470 (1899)	540	456, 72 N.W. 548 (1898)	275,
Sprague v. Moore, 130		277, 415, 450, 455, 462, 466,	
Mich. 92, 89 N.W. 712		484, 509, 511, 525, 573, 609	
(1902)	229, 232, 493,	State v. Owen, 312 Mich.	
.....	568, 577, 580	73, 19 N.W. (2d) 491	
Sprague v. Trustees of		(1945)	402
Protestant Episcopal		Stender v. Kerreos, 156	
Church, 186 Mich. 554,		Mich. 499, 121 N.W. 258	
152 N.W. 996 (1915) ..	413	(1909)	404, 514
Spring v. Randall, 107		Stern Co. v. Friedman, 229	
Mich. 103, 64 N.W. 1063		Mich. 623, 201 N.W. 961	
(1895)	229	(1925)	403
Staebler-Kemp Oil Co. v.		Stevens v. Brown, Walk.	
Mac's Auto Mart, Inc.,		Ch. 41 (Mich. 1842) ..	250
329 Mich. 351, 45 N.W.		Stevens v. Stott, 270 Mich.	
(2d) 316 (1951)	191	637, 259 N.W. 157	
Stafford, Earl of v. Buck-		(1935)	402
ley, 2 Ves. Sen. 170, 28		Stevens v. Wildey, 281	

TABLE OF CASES

675

PAGE	PAGE
Mich. 377, 275 N.W. 179	Club, 218 Mich. 604, 188
(1937) 145, 304,	N.W. 292 (1922) .. 122, 129
..... 341, 354, 356	Sturgis v. Sturgis, 242
Stewart v. Woolley, 121	Mich. 52, 217 N.W. 771
App. Div. 531, 106 N.Y.	(1928) 353, 359, 360
Supp. 99 (1907) 540	Sulzberger v. Steinhauer,
Stewkley v. Butler, Moore	235 Mich. 253, 209 N.W.
K.B. 880, 72 Eng. Rep.	68 (1926) 401
970, <i>sub nom.</i> Stukeley	Swan v. Ispas, 325 Mich.
v. Butler, Hobart 168,	39, 37 N.W. (2d) 704
80 Eng. Rep. 316 (1615) 114	(1949) 78
Stockton v. Williams, 1	Swetland v. Swetland, 3
Doug. 546 (Mich. 1845) 145	Mich. 482 (1855) 397
Stoepel v. Satterthwaite,	Sword v. Keith, 31 Mich.
162 Mich. 457, 127 N.W.	247 (1875) 73
673 (1910) ... 240, 418, 451	Symance v. Tattam, 1 Atk.
Stoney Pointe Peninsula	613, 26 Eng. Rep. 385
Assn. v. Broderick, 321	(1737) 268
Mich. 124, 32 N.W. (2d)	
363 (1948) 90, 397	Taddy v. Sterious, [1904] 1
Storrs v. Benbow, 3 De G.	Ch. 354 183
M. & G. 390, 43 Eng.	Taltarum's Case, Y.B. 12
Rep. 153 (1853) 364	Edw. IV, Mich. pl., 25
Story v. First National	(1472) .. 22, 162, 220, 260
Bank & Trust Co., 115	Tannahill v. Tuttle, 3
Fla. 436, 156 So. 101	Mich. 104 (1854) 250
(1934) 305	Tatton v. Mollineaux,
Stout v. Keyes, 2 Doug.	Moore K.B. 809, 72 Eng.
184 (Mich. 1845) .. 13, 250,	Rep. 920 (1610) ... 27, 267
..... 270	Taylor v. Biddall, 2 Mod.
Straus v. Barbee, 262	289, 86 Eng. Rep. 1078
Mich. 113, 247 N.W. 125	(1678) 270
(1933) 251	Taylor v. Corporation of
Strickland v. Strickland,	St. Helens, 6 Ch. D. 264
[1908] A.C. 551 21, 260	(C.A. 1877) 394
Strong v. Smith, 84 Mich.	Taylor v. Richards, 153
567, 48 N.W. 183 (1891) 359	Mich. 667, 117 N.W. 208
Struble v. Community	(1908) .. 331, 540, 577, 579

	PAGE		PAGE
Thatcher v. Wardens and Vestrymen of St. Andrew's Church of Ann Arbor, 37 Mich.	264	Tillman v. Ogren, 227 N.Y. 495, 125 N.E.	821
(1877)	231, 277, 308,	(1920)	69
.....	414, 543, 574	Tipping v. Piggot, 1 Eq. Cas. Abr. 385, 21 Eng. Rep. 1120 (1711) ..	204, 266
Thayer v. McGee, 20 Mich. 195 (1870)	146,	Toms v. Williams, 41 Mich. 552, 2 N.W.	814
.....	390, 395	(1879) ..	144, 275, 276, 277,
Thellusson v. Woodford, 11 Ves. Jr. 112, 32 Eng. Rep. 1030 (H.L. 1805) ..	292,	.....	294, 299, 327, 345, 348,
.....	433	.....	351, 352, 388, 389, 404,
Thomas v. Jewell, 300 Mich. 556, 2 N.W. (2d) 501 (1942)	390	.....	437, 446, 466, 479, 506,
Thomas v. Ledger, 274 Mich. 16, 263 N.W. 783 (1936)	402	.....	508, 558, 583, 602, 608
Thompson v. Thompson, 330 Mich. 1, 46 N.W. (2d) 437 (1951)	30, 32,	Toomes v. Conset, 3 Atk. 261, 26 Eng. Rep. 952 (1745)	246
.....	71, 325, 337	Torbay Hotel Co. v. Jenkins, [1927] 2 Ch. 225 ..	183
Thompson, In re, [1934] 1 Ch. 342	423	Torpy v. Betts, 123 Mich. 239, 81 N.W. 1094 (1900)	275, 510,
Thomson v. Shakespear, 1 De G. F. & J. 399, 45 Eng. Rep. 413 (1860) ..	426	.....	555, 577, 580
Thorne v. Motor Trade Association, [1937] A.C. 797	181	Townsend v. Gordon, 308 Mich. 438, 14 N.W. (2d) 57 (1944)	379, 383
Ticknor, Estate of, 13 Mich. 44 (1864)	413	Trask v. Green, 9 Mich. 358 (1861) ...	12, 214, 229
Tierney v. McKay, 232 Mich. 609, 206 N.W. 325 (1925)	131	Trask v. Sturges, 170 N.Y. 482, 63 N.E. 534 (1902) ..	525
		Tregonwell v. Sydenham, 3 Dow 194, 3 Eng. Rep. 1035 (H.L. 1815)	434
		Trevor, Matter of, 239 N.Y. 6, 145 N. E. 66 (1924)	607
		Trisch v. Fairman, 334 Mich. 432, 54 N.W. (2d) 621 (1952)	74-75

TABLE OF CASES

677

	PAGE		PAGE
Tritton, Re, 61 L.T.R.	301	Tuttlesham v. Roberts,	
(Q.B. 1889)	319	Cro. Jac. 22, 79 Eng.	
Tromley v. Lange, 236		Rep. 18 (1603)	322
Mich. 240, 210 N.W.	202	Tyrrel's Case, 2 Dyer 155a,	
(1926)	402	73 Eng. Rep. 336 (1557)	5,
Trufant v. Nunneley, 106		.....	202, 247
Mich. 554, 64 N.W.	469	Udal v. Udal, Aleyn 81,	
(1895)	450, 455,	82 Eng. Rep. 926 (1648)	315
505, 522, 585, 587, 592,	602	Underwood v. Curtis, 127	
Truitt v. City of Battle		N.Y. 523, 28 N.E. 585	
Creek, 205 Mich. 180,		(1891)	534, 541
171 N.W. 338 (1920),		Union Guardian Trust	
rev'd. 208 Mich. 618, 175		Co. v. Commercial	
N.W. 578 (1820)	499,	Realty Co., 265 Mich.	
.....	588, 595, 596, 602	604, 251 N.W. 786	
Trustees of Hollis' Hos-		(1933)	251
pital, In re, [1899] 2 Ch.		Union Guardian Trust	
540	391	Co. v. Nichols, 311	
Trustees of the M. J. Clark		Mich. 107, 18 N.W. (2d)	
Memorial Home v.		383 (1945)	548
Jewell, 240 Mich. 250,		Union Mutual Association	
215 N.W. 378 (1927)...	222,	v. Montgomery, 70	
.....	239, 392, 413	Mich. 587, 38 N.W. 588	
Tulk v. Moxhay, 2 Ph.		(1888)	345
774, 41 Eng. Rep. 1143		United States v. New	
(1848)	182	Wrinkle, 342 U.S. 371,	
Tullett v. Armstrong, 4		72 S. Ct. 350 (1952)....	184
My. & Cr. 377, 41 Eng.		United States v. Schraders'	
Rep. 147 (1840)...	206, 426	Son, 252 U.S. 85, 40 S.	
Turnbull v. Johnson, 153		Ct. 251 (1920)	184
Mich. 228, 116 N.W.		Utujian v. Boldt, 242	
1009 (1908)	166	Mich. 331, 218 N.W. 692	
Turnbull v. Leavitt, 158		(1928)	81
Mich. 545, 123 N.W. 43		Van Cott v. Prentice, 104	
(1909)	71	N.Y. 45, 10 N.E. 257	
Turner v. Wright, 4 Beav.		(1887)	581-82
40, 49 Eng. Rep. 252			
(1841)	248		

	PAGE		PAGE
Vanderplank v. King, 3 Hare 1, 67 Eng. Rep. 273 (1843)	304	Villar, In re, [1928] Ch. 471, aff'd, [1929] 1 Ch. 243 (C.A.)	292
Vanderpoel v. Loew, 112 N.Y. 167, 19 N.E. 481 (1889)	603	Vincent v. Crane, 134 Mich. 700, 97 N.W. 34 (1903)	118
Van Deusen v. Brown, 167 Mich. 49, 132 N.W. 472 (1911)	401	Vincent v. Rix, 248 N.Y. 76, 161 N.E. 425 (1928) ..	69
Van Driele v. Kotvis, 135 Mich. 181, 97 N.W. 700 (1903)	451, 472, 561, 567, 577	Wagar v. Stone, 36 Mich. 364 (1877)	251
Van Gallow v. Brandt, 168 Mich. 642, 134 N.W. 1018 (1912)	311, 345, 354, 445, 515, 574, 577, 605	Wager's Estate, Re, 295 Mich. 463, 295 N.W. 227 (1940)	493, 566, 567, 580, 600, 602
Van Rensselaer v. Poucher, 5 Denio 35 (1847)	29	Walker v. Marcellus and Otisco Lake Ry Co., 226 N.Y. 347, 123 N.E. 736 (1919)	275, 276, 484, 486, 508
Van Tyne v. Pratt, 291 Mich. 626, 289 N.W. 275 (1939)	231, 278, 547, 553, 577, 580	Lord Walpole v. Earl of Orford, 3 Ves. Jr. 402, 30 Eng. Rep. 1076 (1797)	73
Vawdry v. Geddes, 1 Russ. & M. 203, 39 Eng. Rep. 78 (1830)	364	Walsh v. Martin, 69 Mich. 29, 37 N.W. 40 (1888) ..	119
Venour v. Blund, S.S.Y.B. 3 & 4 Edw. II, 159 (1310)	14	Walsh v. Secretary of State for India, 10 H.L.C. 367, 11 Eng. Rep. 1068 (1863)	397
Vernon v. Bethell, 2 Eden. 110, 28 Eng. Rep. 838 (1762)	246	Walton v. Torrey, Harr. Ch. 259 (Mich. circa 1836) ..	47, 77, 147, 294, 330
Vernon's Case, 4 Co. Rep. 1a, 76 Eng. Rep. 845 (1572)	40	Wanstead v. Fisher, 278 Mich. 68, 270 N.W. 218 (1936)	419, 420
Vidal v. Girard's Execu- tors, 2 How. (43 U.S.) 127 (1844)	12	Wanzer v. Blanchard, 3 Mich. 11 (1853)	395

TABLE OF CASES

679

	PAGE		PAGE
Ward v. Van der Loeff, [1924] A.C. 653	310	Weber v. Lane, 315 Mich. 678, 24 N.W. (2d) 418 (1946)	196
Ward v. Ward, 163 Mich. 570, 128 N.W. 761 (1910)	224, 227, 493, 548, 577, 580, 582, 610	Weber v. Van Blerck Motor Co., 186 Mich. 449, 152 N.W. 1036 (1915)	129
Warmstrey v. Lady Tan- field, 1 Ch. R. 29, 21 Eng. Rep. 498 (1628)	6, 205	Weco Products Co. v. Sam's Cut Rate, Inc., 296 Mich. 190, 295 N.W. 611 (1941)	194
Waterman v. New York Life Insurance & Trust Co., 237 N.Y. 293, 142 N.E. 668 (1923)	519	Weiland v. Hogan, 177 Mich. 626, 143 N.W. 599 (1913)	196
Watkins v. Minor, 214 Mich. 380, 183 N.W. 186 (1921)	57, 153, 331	Welcden v. Elkington, 2 Plowd. 516, 75 Eng. Rep. 763 (1578)	160
Watrous v. Allen, 57 Mich. 362, 24 N.W. 104 (1885) 192,	392	Welling v. Strickland, 161 Mich. 235, 126 N.W. 471 (1910)	252
Wayne Woods Land Co. v. Beeman, 211 Mich. 360, 178 N.W. 696 (1920)	401	Wellock and Hammon's Case, 2 Leon. 114, 74 Eng. Rep. 403 (1589)	261
Weadock v. Champe, 193 Mich. 553, 160 N.W. 564 (1916)	401	Wells v. Wells, 88 N.Y. 323 (1882)	603
Webb v. Hearing, Cro. Jac. 415, 79 Eng. Rep. 355 (1616)	313, 314, 315	Wendell v. Crandall, 1 N.Y. 491 (1848)	29
Webb v. Knauss, 253 Mich. 197, 234 N.W. 154 (1931)	133, 389	Wentworth, Matter of, 230 N.Y. 176, 129 N.E. 646 (1920)	225
Webb v. Sadler, L.R. 14 Eq. 533 (1872), L.R. 8 Ch. App. 419 (1873)	374	Wertheimer v. Hosmer, 83 Mich. 56, 47 N.W. 47 (1890)	120-21, 134, 135
Weber v. Ford Motor Co., 245 Mich. 213, 222 N.W. 198 (1928)	392	Wessborg v. Merrill, 195 Mich. 556, 162 N.W. 102 (1917)	166, 330, 348, 360
		West Texas Bank & Trust Co. v. Matlock, 212 S.W.	

	PAGE		PAGE
937 (Tex. Com. App. 1919)	300	Wilcock's Settlement, In re, 3 [1875] 1 Ch. Div. 229	66
Wharton v. Masterman, [1895] A.C. 186 ..	434, 435	Wilcox v. Cline, 70 Mich. 517, 38 N.W. 555 (1888)	401
Wheeler v. Thorogood, Cro. Eliz. 137, 78 Eng. Rep. 384 (1589)	140	Wilcox v. Mueller, 250 Mich. 167, 229 N.W. 600 (1930)	82
Wheelock v. American Trust Society, 109 Mich. 141, 66 N.W. 955 (1896)	240, 413, 416, 417, 450, 461	Wilcox, Matter of, 194 N.Y. 288, 87 N.E. 497 (1909)	276, 484, 486, 508, 534, 542
Whitby v. Mitchell, L.R. 44 Ch. Div. 85 (1890) ..	100, 264, 427	Wilkes v. Lion, 2 Cow. 333 (1823)	29
Whitby v. Von Luedecke, [1906] 1 Ch. 783	271	Willett v. Winnell, 1 Vern. 488, 23 Eng. Rep. 611 (1687)	246
White v. Grand Rapids & Indiana Ry. Co., 190 Mich. 1, 155 N.W. 719 (1915)	71	Williams v. Earle, L.R. 3 Q.B. 739 (1868)	121
White v. Rice, 112 Mich. 403, 70 N.W. 1024 (1897)	415	Williams v. Montgomery, 148 N.Y. 519, 43 N.E. 57 (1896)	534, 541
Whitely, Ltd. v. Hilt, [1918] 2 K.B. 808 (C.A.)	170	Williams v. Springfield, 1 Vern. 476, 23 Eng. Rep. 602 (1687)	246
Whitley v. Tessman, 324 Mich. 215, 36 N.W. (2d) 724 (1949)	252	Williams v. Teale, 6 Hare 239, 67 Eng. Rep. 1155 (1847)	421
Whitney v. McConnell, 29 Mich. 12 (1874)	171	Williamson v. Cook, Sel. Cas. in Chan. (S.S.) pl. 118 (1417-1424)	4, 201
Whitworth v. Gaugain, 3 Hare 416, 67 Eng. Rep. 444 (1844)	204	Willion v. Berkley, 1 Plowden 223, 75 Eng. Rep. 339 (1559)	261, 318
Wickham v. Dighton, Monro, Acta Cancellariae 109 (1607)	159	Wills v. Palmer, 5 Burr. 2615, 98 Eng. Rep. 376 (1770)	19

	PAGE		PAGE
Wilson v. Odell, 58 Mich.		Wood, In re, [1894] 3 Ch.	
533, 25 N.W. 506 (1885)	276,	381 (C.A.)	308
277, 281, 295, 298-9, 409, 438,		Woodall v. Clifton, [1905]	
450, 455, 460, 466, 543, 553,		2 Ch. 257	400
559, 567, 568, 573, 577, 584		Woodmeston v. Walker, 2	
Wilson v. Terry, 130 Mich.		Russ. & M. 197, 39 Eng.	
73, 89 N.W. 566 (1902)	30,	Rep. 370 (1831)	206
	337	Woods v. Gaar, Scott &	
Wind v. Jekyl, 1 P. Wms.		Co., 93 Mich. 143, 53	
572, 24 Eng. Rep. 522		N.W. 14 (1892)	250
(1719)	113	Woolfitt v. Preston, 203	
Windiate v. Leland, 246		Mich. 502, 169 N.W. 838	
Mich. 659, 225 N.W. 620		(1918)	498, 577,
(1929)	88, 167, 402		589, 596, 604
Windiate v. Lorman, 236		Worcester County Trust	
Mich. 531, 211 N.W. 62		Co. v. Marble, 316 Mass.	
(1926)	88, 149, 275,	294, 55 N.E. (2d) 446	
	276, 400, 511, 514	(1944)	310
Windmill Point Land Co.		Worcester, Earl of v.	
v. Jackson, 269 Mich. 50,		Finch, 2 Anderson 162,	
256 N.W. 619 (1934)	255	123 Eng. Rep. 600	
Wing v. McDowell, Walk.		(1600)	6, 205
Ch. 175 (Mich. 1843)	252	Worthing Corporation v.	
Witham v. Vane, (H.L.		Heather, [1906] 2 Ch.	
1883)	397	532	399
Wolfe v. Shelley, 1 Co.		Wray-Austin Machinery	
Rep. 93b, 75 Eng. Rep.		Company v. Flower, 140	
206 (1579-81)	325	Mich. 452, 103 N.W. 873	
Wollaston v. King, L.R. 8		(1905)	126, 133
Eq. 165 (1868)	373, 383	Wright v. Kaynor, 150	
Wood v. Drew, 33 Beav.		Mich. 7, 113 N.W. 779	
610, 55 Eng. Rep. 505		(1907)	403
(1864)	389	Wright v. Wright, 1 Ves.	
Wood v. Griffith, 1 Swans.		Sr. 409, 27 Eng. Rep.	
43, 36 Eng. Rep. 291		1111 (1749-50)	140, 147
(1818)	248	Wright's Estate, 284 Pa.	
		334, 131 Atl. 188 (1925)	310

	PAGE		PAGE
Wyndham v. Wyndham, 3 Bro. C.C. 58, 29 Eng. Rep. 407 (1790)	363	Yelverton v. Newport, Tot- hill 129, 21 Eng. Rep. 144 (1593)	159
Wyrzykowski v. Budds, 324 Mich. 731, 37 N.W. (2d) 686 (1949)	238	Young v. Young, 255 Mich. 173, 237 N.W. 535 (1931)	222, 286, 501, 577, 610
Wyrzykowski v. City of Hamtramck, 324 Mich. 738, 37 N.W. (2d) 689 (1949)	238	Zeidler v. Burlingame, 260 Mich. 596, 245 N.W. 527 (1932)	255

Index

- Absolute Power of Alienation.
See: Suspension of the Absolute Power of Alienation.
- Absolute Power of Disposition.
See: Powers.
- Accumulations, xi, 432-447
- Advancements for Education and Support from, 441-442
- Charity, 435, 447
- Chattels Personal
applicability of Michigan statutes, 438, 441-442, 443-444
- Common-law Rule Against, xi, 432-437, 446
- Definition, 432
- Direction to Establish Sinking Fund, 437-438
- Direction to Pay Income Quarterly, 442
- Direction to Pay Off Encumbrance, 438
- Duration
beyond minority of beneficiary, 443
common-law rules, 433-435, 437
minorities of several persons, 438
minority of unborn person, 606-607
period in gross, 442
thirty-three year statutory period, 445
- English law, 433-434
- Exceptions to Restrictions on charitable trusts, 447
- trusts for care of graves, 447
- trusts for employees, 447
- For Benefit of Others than Minor, 440
- For Benefit of Persons Not in Being, 439, 606-607
- Married Women, 215, 437, 549
- Michigan Law, xi, 435-447
- Michigan Statutes
amendments, 443-444, 445-446
applicability to chattels personal, 438, 441-444
effect of violation, 439, 555
enactment, 435-436
mixed disposition of land and chattels, 443
repeal, 445-446
- Minority of Person Not in Being, 439, 606-607
- Mixed Disposition of Land and Chattels, 443
- New York Statutes, 440, 479-483
- Relation of Rules to Rule Against Perpetuities, xi
- Relation of Rules to Rule Against Restraints on Alienation, xi
- Royalties Under Mineral Lease, 439
- Rule Against Perpetuities, xi, 326
- Statutes Restricting purpose, 480-483
- Termination, 434-435

- Trusts for Permitted, 437
- Administrative Delays
 - Rule Against Perpetuities, 307-309, 346
 - Suspension of the Absolute Power of Alienation, 573-574
- Agnatic Family, xii
- Alienability, See also headings for various property interests, e.g., Estates in Fee Simple.
 - English Law Summarized, 6-7
 - History, 1-7
- Alienation. See: Alienability, Restraints on Alienation, Suspension of the Absolute Power of Alienation.
- Alimony, 209
- All or Nothing Rule. See: Class Gifts.
- Alternative Limitations. See: Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Alternative Measures. See: Rule Against Perpetuities (Period); Suspension of the Absolute Power of Alienation (Period).
- Animals. See: Charities, Honorary Trusts, Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Annuity
 - Suspension of the Absolute Power of Alienation, 555-569
- Annuity Contracts
 - Restraints on Alienation, 195-196
- Appointed Interests. See: Powers.
- Ascertainment of Measuring Lives. See: Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Attachment. See: Creditors.
- Attainder. See: Treason.
- Attornment, 2
- Bailment. See: Chattels Personal.
- Bankruptcy
 - Contingent Interests, 140
 - Estates Tail, 23
 - Trusts, 237
- Bargain and Sale, 247
- Beneficiary. See: Trusts.
- Blue Sky Law, 196
- Bona Fide Purchaser, 204, 207, 221, 266
- Bonds
 - Restraints on Alienation, 195-196
- Borough English, 66
- Cemeteries. See: Graves.
- Certainty. See: Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Cestui Que Trust. See: Trusts.
- Charitable Corporations. See: Charities.
- Charitable Trusts. See: Charities.
- Charities. See also: Trusts.
 - Accumulations, 435, 447
 - Charitable Corporations conveyance to creates perpetuity, 261, 409-410

- distinguished from charitable trust, 84-85, 409-415, 515
- gifts to valid, 412-413, 515-516
- power of alienation, 84, 509, 515
- rule against perpetuities, 409-411, 418-419
- Charitable Trusts
 - accumulations. See: Accumulations.
 - benefit of animals, 423
 - definiteness of beneficiaries, 416-420
 - definiteness of purpose, 416-420
 - distinguished from charitable corporation, 84-85, 409-415, 515
 - duration, 218, 415, 416-417, 422-423
 - interest of beneficiaries, 412
 - Michigan law summarized, 419-421
 - public welfare trusts, 419
 - religious societies, 414-415
 - restraints on alienation. See: Restraints on Alienation.
 - restraints on termination, 218, 415-417, 422-423
 - restrictions on creation, 411
 - rule against perpetuities. See: Rule Against Perpetuities.
 - suspension of the absolute power of alienation. See: Suspension of the Absolute Power of Alienation.
 - unincorporated societies, 414-415, 425-426
 - vesting of cestuis's interests, 411-412
 - vesting of trustee's estate, 411-412
- Condition Subsequent on Gift to, 84-86, 239-240
- Cy Pres Doctrine, 449
- Michigan Statutes, 418-419
- Mortmain Statutes, 308, 198-199, 410
- Public Welfare Trusts, 419
- Religious Societies
 - trusts for, 414-415
- Restraints on Alienation, 85-86
- Rule Against Perpetuities
 - duration, 218, 415-417, 418-419, 422-423
 - remoteness of vesting, 409-422, 447-448
- Statute of Charitable Uses, 12
- Suspension of the Absolute Power of Alienation, 414-417, 418-419, 509, 515-516
- Unincorporated Societies
 - conveyances to, 413
 - trusts for, 414-415, 425-426
- Chattels Personal
 - Accumulations. See: Accumulations.
 - Alienability, 6
 - bailee's interest, 170-171
 - blue sky law, 196
 - expectant interests. See: Expectant Interests.
 - interest of chattel mortgagor and conditional vendee, 170-171
 - trusts. See: Trusts.
 - Bailment, 158, 169-172

- analogous to estate for years, 171
- Charitable Trusts, 417-421
- Class Gifts. See: Class Gifts.
- Commercial Transactions
 - history, 172-180
- Corporate Stock
 - restraints on alienation, 62, 195-196
 - rule against perpetuities, 408
- Covenants, 182-183
- Credit Sale, 173
- Disposition on Death, 159
- Easements in, 182
- Equitable Restrictions on, 183, 189
- Estates for Life in, 321
 - applicability of Michigan statutory restrictions, 327, 483-484, 494
- Estates in
 - applicability of Michigan statutes, 327
- Estates Tail in, 27, 281, 465
- Executory Interests in, 164, 317-319
- Expectant Interests in, 155-160, 163-164, 267, 317-319
 - trust, 160
- Forfeiture
 - bailee's interest, 171
- History of Law of, 155-162
- Possibility of Reverter, 155, 164
- Powers. See also: Powers.
 - applicability of Michigan statutes, 379, 383
- Remainders, 163-164, 267, 317, 319, 326-327
 - expectant upon estate for years, applicability of Michigan statutory restrictions, 327, 494
- Resale Price Maintenance Contracts, 180-194
- Restraints on Alienation. See: Restraints on Alienation.
- Reversions, 164
- Right of Entry, 155, 164, 182
- Rule Against Perpetuities. See: Rule Against Perpetuities.
- Spendthrift Trusts, 208-210, 229-239, 428, 430
- Statute of Uses, 202
- Suspension of Absolute Ownership
 - New York statutes, 483
- Suspension of the Absolute Power of Alienation. See: Suspension of the Absolute Power of Alienation.
- Transfer by Will, 6, 159
- Trusts. See also: Trusts.
 - applicability of Michigan statutes, 230-231, 327
- Unique Chattels, 157
- Vesting, 319, 326-327
 - applicability of Michigan statutes, 327
- Chattels Real. See: Estates for Years.
- Child En Ventre Sa Mere, 266, 297-298, 301, 569, 579
- Children. See also: Class Gifts, Vesting.
 - Adopted, 310
 - Construction of Instruments, 310
- Claffin v. Claffin, Rule In. See: Trusts (Termination).
- Class Gifts, 358-369

- All or Nothing Rule, 363-369, 461, 554
 - exceptions, 364-365
 - relation to rule of convenience, 365-369
- Closing of Class, 361-363
 - effect of statutory restrictions on estates for life, 495
- Defined, 358-361
- Effect of Statutory Restrictions on Estates for Life, 495
- Gift to Group Is, 358-359
- Gift to Named Persons Is Not, 358
- Opening of Class, 361-362
- Requirement of Survival, 350-357, 360-361
- Right of Survivorship, 361
- Rule Against Perpetuities, 363-369, 461, 491, 554
- Rule of Convenience, 361-369
 - contrary manifestation of intention, 361
 - effect of statutory restrictions on estates for life, 495
 - exceptions, 362-363
 - relation to all or nothing rule, 365-369
- Survivorship, 350-357, 360-361
- Suspension of the Absolute Power of Alienation
 - class as donee of power, 520-521
 - class as object of power, 521-522
 - class which may include members not in being, 505-506, 554
 - class whose members cannot be ascertained, 506
 - rules same as under rule against perpetuities, 491
- Unit Rule, 363-369, 461, 554
 - exceptions, 364-365
 - relation to rule of convenience, 365-369
- Vesting, 362-369, 554
- Commencement of Period. See: Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Commercial Transactions. See: Chattels Personal, Restraints on Alienation.
- Common Law
 - Includes Plantagenet Statutes, 14-16
 - In Force in Michigan, 13-14, 270
- Common-Law Rule Against Accumulations. See: Accumulations.
- Common-Law Rule Against Perpetuities. See: Rule Against Perpetuities.
- Common Recovery. See: Estates Tail, Estates for Years.
- Competition, 174, 178, 179, 174-195
- Computation of Period. See: Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Concurrent Limitations. See: Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Conditional Sale Contract, 170-171
- Condition
 - Nominal, 52-53, 110, 323
 - Survival, 350-357

- Condition Precedent
 - Effect of Illegality, 152-153, 448-449
 - Prevents Vesting, 312-313, 333, 344
- Condition Subsequent. See also: Restraints on Alienation, Right of Entry, Suspension of the Absolute Power of Alienation, Vesting.
 - Enures Only to Benefit of Grantor, 142, 262
- Conditional Limitation. See: Executory Interests, Expectant Interests.
- Consequences of Invalidity. See: Restraints on Alienation.
- Consequences of Violation. See: Accumulations, Estates for Life (Statutory Restrictions on), Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Construction of Instruments
 - Adopted Children, 310
 - Death Without Issue, 322, 326
 - Effect of Statutory Restrictions on Estates for Life, 495
 - Influence of Rule Against Perpetuities, 356-357
 - Meaning of "Children," 310
 - Meaning of "Heirs," 336-337
 - Meaning of "Wife," 573
 - Meaning of "Surviving," 351-353, 583, 594
 - Options in Leases, 405-406
 - Preference for Early Vesting, 339, 345, 348, 354
 - Restraints on Alienation, 48, 148
 - Rule Against Perpetuities, 356-357
 - administrative delays, 307-308
 - Suspension of the Absolute Power of Alienation
 - administrative delays, 574
 - Vesting. See: Vesting.
 - Words Which Create Estate Tail, 20-21, 30-33
- Contingent Remainder. See: Remainder, Vesting.
- Contracts. See also: Land Contract.
 - Restraints on Alienation, 180-195
 - Rule Against Perpetuities, 397-398
 - Suspension of the Absolute Power of Alienation, 515
- Convenience. See: Rule of Convenience.
- Coots Case. See: Rule in In Re Coots' Estate.
- Corporate Stock
 - Restraints on Alienation, 62, 195-196
 - Rule Against Perpetuities, 408
- Co-Tenancy. See also: Joint Tenancy, Tenancy in Common.
 - Restraints on Alienation, 8
- Covenants. See also: Restraints on Alienation.
 - Chattels Personal, 182-183, 189
- Creditors
 - Access to Equity of Redemption, 245
 - Access to Estates for Life, 112
 - Access to Estates for Years, 112, 132, 133

- Access to Estates in Fee Simple, 7, 112
- Access to Estates Tail, 23
- Access to Legal Interests, 7
- Access to Spendthrift Trusts, 208-209, 230-239, 428, 430-431
- Access to Trusts, 207, 228-229, 237
- Bankruptcy, 23, 140, 237
- Estates for Years
 - conditions against access, 131-132
 - Michigan statute, 132
 - policy considerations, 135-137
- Power of Appointment, 378-379
- Uses Designed to Defraud, 200
- Cy Pres Doctrine
 - Charitable Trusts, 449
 - Rule Against Perpetuities, 449
- Death Benefit Plan. See: Trusts.
- Debentures, 195-196
- Default of Appointment. See: Powers.
- Defeasibility
 - Restraints on Alienation, 8
 - Vesting. See: Vesting.
- Descent. See also: Estates Tail, Expectant Interests, Restraints on Alienation.
 - Michigan Statutes, 66
- Destructibility
 - Contingent Remainder, 59, 101, 262-266, 272, 328-329, 409
 - Estate for Life, 263, 93
 - Estate for Years, 112, 113
 - Estate Tail. See also: Estates Tail.
 - interest expectant upon, 22, 25-26, 36, 280-283
 - Executory Interests, 23, 25-26, 36, 69, 268, 281-282
 - Expectant Interests in Chattels, 268
 - Expectant Interests Under Trusts, 268, 409
 - Reversions, 101, 281
 - Right of Entry, 24
 - Rule Against Perpetuities. See: Rule Against Perpetuities.
 - Spendthrift Trust, 427-431
 - Suspension of the Absolute Power of Alienation. See: Suspension of the Absolute Power of Alienation.
 - Trusts, 268, 409, 426-431, 533-549, 572, 576. See also: Trusts (Restraints on Termination; Termination).
- Determinable Estate, 139. See also: Possibility of Reverter.
- Direction to Accumulate. See: Accumulations.
- Direct Restraint on Alienation. See: Restraints on Alienation.
- Disability Plan. See: Trusts.
- Disabling Restraints. See: Restraints on Alienation.
- Discretionary Trust, 238
- Dividends. See: Accumulations.
- Division, Restraints On, 81-83
- Doctrine of Worthier Title, 19
- Donative Transactions. See: Chattels Personal, Restraints on Alienation.
- Donee. See: Chattels Personal, Estates Tail, Powers.

- Donor (of Power), 370
- Double Possibilities, Rule Against. See: Rule in *Whitby v. Mitchell*
- Dower
- Alienability, 140-141, 146-147
 - Barrability, 147
 - Power of Appointment, 379
 - Trust Property, 204
- Duration. See: Accumulations, Estates for Years, Trusts.
- Easements
- Chattels Personal, 182
 - Do Not Prevent Vesting, 394
 - Restraints on Alienation, 8
 - Right to Exclusive Possession, 394-395
- Ecclesiastical Corporations.
- See: Charities, Mortmain.
- Effect of Invalidity. See: Restraints on Alienation.
- Effect of Violation. See: Accumulations, Estates for Life (Statutory Restrictions on), Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Election to Take Against Will, 306
- Employees' Trusts. See: Trusts.
- English Law. See also headings for specific legal problems and Table of Statutory and Constitutional Citations.
- Reception in Michigan, 9-16, 141, 270
- Engrossing, 175-178
- Entails. See: Estates Tail.
- Entirety. See: Estates by the Entirety.
- En Ventre Sa Mere. See: Child En Ventre Sa Mere.
- Equitable Charge
- Distinguished from Trust, 559
 - Suspension of the Absolute Power of Alienation, 555-556, 559-560, 566, 567
- Equitable Conversion. See: Suspension of the Absolute Power of Alienation.
- Equitable Interests. See also: Trusts.
- Contingent Remainders
- destructibility, 142, 267-268, 409
 - rule against perpetuities, 271
- Equitable Charge
- distinguished from trust, 559
 - suspension of the absolute power of alienation, 555-556, 559-560, 566, 567
- Equity of Redemption
- access by creditors, 245
 - alienability, 242, 245-246
 - devisability, 245
 - estate tail in, 245
 - restraints on alienation, 245-247
 - rule against perpetuities, 407
 - suspension of the absolute power of alienation, 515
- Estates for Life, 219, 493
- Estates for Years
- restraints on alienation, 208-209
- Estates in Fee Simple, 216, 218, 219
- Estates Tail, 23, 245, 267
- Expectant Interests
- destructibility, 142, 267-268, 409

- rule against perpetuities, 271, 387
- upon estate tail, 267, 268
- Land Contract Vendee's, 247-258
 - alienability, 248-249
 - devisability, 248-249
 - heritability, 248
 - restraints on alienation, 59-61, 251-258
 - rule against perpetuities, 407-408
 - suspension of the absolute power of alienation, 515
- Old Rule Against Perpetuities, 264
- Options,
 - restraints on alienation, 87-90, 153, 167
 - rule against perpetuities, 88-90, 167, 398-407
 - suspension of the absolute power of alienation, 89, 401, 513-514
- Origin and History, 198-205, 240-249
- Restraints on Alienation. See: Restraints on Alienation.
- Rule Against Perpetuities. See: Rule Against Perpetuities.
- Rule in *Whitby v. Mitchell*, 264
- Suspension of the Absolute Power of Alienation. See: Suspension of the Absolute Power of Alienation.
- Trusts. See: Trusts.
- Equitable Restrictions, 8
 - Chattels Personal, 182-183, 189
 - Do Not Prevent Vesting, 394
 - Land, 182-183
- Equity of Redemption
 - Access by Creditors, 245
 - Alienability, 242, 245
 - Devisability, 245
 - Estate Tail in, 245
 - Nature of Interest, 244-246
 - Restraints on Alienation, 245-247
 - Rule Against Perpetuities, 407
 - Suspension of the Absolute Power of Alienation, 515
- Escheat, 262
- Escrow, 280
- Estates by the Entirety, 8, 65
- Estates for Life
 - Access by Creditors, 112
 - Alienability, 6, 91-92
 - Changed to Fee, 72, 378-379
 - Chattels Personal, 321
 - Michigan statutory restrictions, 327, 483-484, 494
 - Devisability, 92
 - Endless Series of, 99-100, 260, 264, 272-273
 - Entailment, 92
 - Equitable, 219, 493
 - Forfeiture, 92, 101, 263
 - Heritability, 92
 - Incidents Fixed, 37-39
 - In Estate for Years
 - remainder on, Michigan statutory restrictions, 478, 494
 - In remainder
 - may be vested, 314
 - In Uses, 201
 - Life Tenant's Power to Lease, 516, 527
 - Michigan Statutes, 46, 97-98, 108, 477-478
 - Motives for Creating, xi

- Perpetual Freehold, 99-100,
 260, 264, 272-273
- Pur Autre Vie
 definition, 91
 devisability, 92
 measuring lives, Michigan
 statutory restrictions,
 478
 remainder expectant upon,
 Michigan statutory re-
 strictions, 478, 494, 500-
 502
 special occupant, 92
- Remainder Expectant Upon,
 94, 138, 314, 318
- Restraints on Alienation.
 See: Restraints on Aliena-
 tion.
- Reversion Expectant Upon,
 94, 138
- Rule Against Perpetuities,
 301-302
- Sale of Fee on Petition of
 Life Tenant, 110, 286-287
- Special Limitation, 314, 318
- Special Occupant, 92
- Statutory Restrictions on,
 477-484, 493-503
 applicability to chattels
 personal, 327, 483-484,
 494
 applicability to trusts, 493-
 494, 497, 501-502
 beneficial life interest,
 493, 497
 trustee's estate, 493-494,
 501-502
 consequences of violation,
 502-503, 555
 effect on class gift rules,
 495
 enactment, 477-478, 493
 estates pur autre vie
 measuring lives, 478
 remainder on, 478, 494,
 500-502
 partial repeal, 479, 494,
 503
 purpose, 480-483
 remainder expectant upon
 estate for years, 478, 494,
 503
 chattels personal, 327,
 494
 statute still in force, 479,
 494, 503
 repeal, 479
 scope and arrangement of
 discussion of, 490-492
 successive estates for life,
 103, 108-109, 456, 477-
 478
 concurrent estates for
 life, 498-501
 more than two, 456, 477-
 478, 496-500
 persons not in being,
 456, 494-495
- Subject to Estate for Years,
 312
- Tenant's Power to Lease,
 516, 527
- Types of, 91
- Unaffected by Quia Emp-
 tores Terrarum, 94
- Unlimited Power to Dispose
 of Fee, 71, 284-285, 372-
 373, 378, 529-530
- Estate for Years. See also: In-
 teressia Termini.
- Access by Creditors, 112, 132
- Accumulations
 direction to replace lease,
 432
 royalties under mineral
 lease, 439

- Alienability, 6, 111-112, 117, 118, 132
- Analogies to Bailments, 169
- As Substitute for Mortgage, 241
- Commencing on Uncertain Future Event, 312
- Destructibility, 112, 113, 118, 125
- Devisability, 6, 112
- Duration
 - constitutional limit, 115-116, 137, 474
 - mediaeval situation, 113
- Estate for Life in
 - remainder on, Michigan statutory restrictions, 478
- Estates Tail in, 26, 267, 281, 465
- Executory Interest Cutting Off or Following, 312-313
- Expectant Interest Cutting Off or Following 312-313
- Expectant Interests in, 116-117, 267-268, 317, 318-319, 324-325
- Forfeiture, 112, 118, 125
- Freehold Estate Subject to, 312-313
- History, 111, 169-170
- Incidents Fixed, 37-38
- In Uses, 201
- Land Contract Vendee's Interest, 249, 257
- Life Tenant's Power to Create, 516, 527
- Michigan Statutes, 46, 116, 478
- On Special Limitation, 312-313
- Remainder Expectant Upon, 116-117, 138, 312-313, 317
 - chattels personal
 - Michigan statutory restrictions, 327, 494
 - contingent, 262-263
 - Michigan statutory restrictions, 474, 478, 494
 - vested, 263, 312-313
- Remainder in, 116, 138-141, 317
 - expectant upon estate pur autre vie, Michigan statutory restrictions, 478
- Restraints on Alienation. See: Restraints on Alienation.
- Reversion Expectant Upon, 116, 138, 388, 391
- Right of Entry, 391
- Rule Against Perpetuities. See also: Rule Against Perpetuities.
 - endless series of five-year terms, 287
 - options in leases, 399-406
- Shifting Interest in, 114
- Statute of Uses, 202
- Statutory Restrictions on
 - suspension of absolute ownership, 478, 508
- Suspension of Absolute Ownership, 478, 508
- Suspension of the Absolute Power of Alienation, 276, 484
- Trusts. See also: Trusts.
 - applicability of Michigan statutes, 231
 - passive, 216
- Estates in Expectancy. See: Expectant Interests.
- Estates in Fee Simple
 - Access by Creditors, 7, 112

- Alienability, 3, 39, 42, 43, 94
- Devisability, 4, 5, 67-68, 143, 200, 201, 221
- Equitable Estates in, 216, 218-219
- Estate for Life Changed to, 72, 378-379, 529-530
- Estates Tail Converted into, 36, 325
- Expectant Interest Cutting Off or Following, 318-319
- Heritability, 66
- Incidents Fixed, 37-39, 44, 47, 94
- In Uses, 201
- Michigan Statute Recognizing, 46
- Mortgagor's Interest, 246, 251
- Remainder Expectant Upon, 39, 261, 318-319, 324
- Restraints on Alienation. See: Restraints on Alienation.
- Reversion Expectant Upon, 39, 43, 261, 388
- Sale on Petition of Life Tenant, 110, 286-287
- Subject to Estate for Years, 312-313
- Estates in Fee Simple Conditional. See: Estates Tail.
- Estates in Joint Tenancy. See: Joint Tenancy.
- Estates in Land (Types of), 38, 46, 273, 323-325
- Estates Pur Autre Vie. See: Estates for Life.
- Estates Tail
 - Abolished in Michigan, 28-29, 36, 325, 450
 - Access by Creditors, 23
- Alienability, 21-26
- Barrability
 - common recovery, 22, 25-26, 220, 260, 266-267
 - fine, 22, 267
 - perpetuity, 260
 - restraints on, 25, 26, 83
 - 1331-1472, 21-22, 220
 - warranty, 23
- Chattels Personal, 27, 281, 465
- Converted into Fee Simple, 28, 36, 325
- Created by De Donis Conditionalibus, 20
- Cy Pres Doctrine, 449
- Descent, 66
- Devisability, 24
- Discontinuance, 24, 83, 139
- Equitable Interests, 23, 245, 267
- Estate for Life, 93
- Estates for Years, 26, 267, 281, 465
- Expectant Interest Cutting Off or Following, 22-23, 26, 36, 268, 281-283
- Fee Simple Conditional, 18, 33, 38
- Forfeiture, 22, 23-24, 200
- How Created, 20-21, 31-33
- Incidents Fixed, 37-39
- In Equity of Redemption, 245
- Interests Expectant Upon
 - destructibility, 22-23, 25-26, 36, 281-282
 - equitable, 268
 - rule against perpetuities, 281-282
- In Uses, 201
- Maritagium, 17, 18, 21, 38

- Meaning Before De Donis Conditionalibus, 28
 Michigan Statutes, 27-30, 325
 New York Statutes, 29
 Not Affected by Quia Emp-
 tores Terrarum, 20
 Remainder Expectant Upon,
 20, 22, 25-26, 33-36, 138,
 281-282, 312-315, 318, 325,
 465
 barrability, 22, 25-26, 36,
 281-282
 Restraints on Alienation, 21-
 22, 24, 25-26, 83
 Reversion Expectant Upon,
 20, 22-23, 138
 abolished in Michigan, 388
 barrability, 22-23, 25-26
 Roman Law, 21
 Taltarum's Case, 22
 Evidences of Debt (Restraints
 on Alienation), 195-196
 Execution. See: Creditors.
 Executory Devise. See: Execu-
 tory Interests.
 Executory Interests
 Alienability, 140-141, 143-
 144, 485, 507
 Chattels Personal, 163-164,
 319
 Cutting Off Estate in Fee
 Simple, 318
 Cutting Off or Following
 Estate for Years, 312-313
 Cutting Off or Following
 Estate Tail
 destructibility, 22-23, 25-
 26, 36, 281-282
 equitable, 267, 268
 rule against perpetuities,
 281-282
 Defined, 317-319
 Destructibility, 22-23, 25-26,
 36, 69, 268, 281-282
 cutting off or following
 estate tail, 281-282
 Devisability, 141, 143
 Differences Between Remain-
 ders and
 abolished in Michigan, 324
 Estate for Years to Com-
 mence on Uncertain Fu-
 ture Event, 312-313
 Expectant Upon Estate in
 Fee Simple, 318-319
 Future Estates in Michigan,
 323, 325
 Heritability, 141, 143
 Interesse Termini, 317
 Interest Subject to May be
 Vested, 316-317, 343
 Interest Subsequent to, 315,
 317, 320
 In Uses, 201
 May Become Remainder,
 320
 Michigan and New York Sta-
 tutes, 69
 Michigan Statutes Convert to
 Remainder, 324-325
 On Failure to Alienate, 69
 Permitted by English Law,
 312
 Restraints on Alienation.
 See: Restraints on Aliena-
 tion.
 Rule Against Perpetuities,
 317-322, 387
 cutting off or following
 estate tail, 281-282
 generally subject to, 387
 some are exempt from,
 320-321, 330-332
 Shifting, 317-318
 Springing, 317-318

- Suspension of the Absolute Power of Alienation, 504-516
- Types of, 139, 158, 317-319
- Vesting, 317-332
 - certain to become possessory, 320-321, 330-332
 - cutting off or following estate for years, 312-313
 - deferred possession, 319-323, 330-332, 343
 - English law, 319-323
 - Michigan law, 326-332
 - non-possessory interest, 320
 - not contingent, 319-320
- Executory Land Contract. See: Land Contract.
- Expectant Interests. See also: Executory interests, Interestia Termini, Possibility of Reverter, Remainders, Reversions, Rights of Entry, Trusts.
 - Alienability, 8, 140-141, 143, 275, 393, 485, 507
 - Chattels Personal, 155-160, 163-164, 267-268, 317, 319
 - Course of Descent, 141
 - Cutting Off Estate in Fee Simple, 318-319
 - Cutting Off or Following Estate for Years, 312-313
 - Cutting Off or Following Estate Tail, 22-23, 25-26, 36, 268, 281-282
 - Destructibility
 - chattels personal, 267-268
 - contingent remainders, 59, 101, 262-266, 272, 273, 328, 409
 - executory interests, 22-23, 25-26, 36, 69, 268, 281-282
 - expectant upon estate tail, 22-23, 25-26, 36, 281-282
 - interests under trusts, 268, 409
 - Devisability, 141, 143
 - Estates for Years, 116-117, 267-268, 312, 317, 319, 324-325
 - Executory Interest. See: Executory Interests.
 - Expectant Upon Estate in Fee Simple, 318-319
 - Expectant Upon Estate Tail
 - destructibility, 22-23, 25-26, 36, 281-282
 - equitable, 267, 268
 - rule against perpetuities, 281-282
 - Future Interest (Definition), 311
 - Heritability, 141-143
 - Interestia Termini. See: Interestia Termini.
 - In Uses, 201
 - Michigan Statutory Classification, 69, 143, 323-325
 - Motives for Creating, xi
 - Option, 398
 - Perpetuity, 261
 - Possibility of Reverter. See: Possibility of Reverter.
 - Remainder. See: Remainders.
 - Restraints on Alienation. See: Restraints on Alienation.
 - Reversion. See: Reversions.
 - Right of Entry. See: Rights of Entry.
 - Rule Against Perpetuities. See: Rule Against Perpetuities.

- Suspension of the Absolute Power of Alienation. See: Suspension of the Absolute Power of Alienation.
 Trusts. See: Trusts.
 Types of, 69, 138-140, 143, 157-158, 311-312, 317-319, 323-325
- Fair Trade Laws, 185-187, 193-194
 Michigan Statute, 193-194
 Non-Signer Provisions, 185-187, 193-194
- Family Endowments. See: Perpetuity.
- Fee Simple. See: Estates in Fee Simple.
- Fee Simple Conditional. See: Estates Tail.
- Fee Tail. See: Estates Tail.
- Feoffee to Uses. See: Uses.
- Fine. See: Estates Tail.
- Fine for Alienation, 3, 135-136
- Forcible Entry and Detainer, 133
- Foreclosure, 244
- Forestalling, 174-178
- Forfeiture. See also: Estates for Life, Estates for Years, Possibility of Reverter, Restraints on Alienation, Right of Entry.
 Attainder of Treason, 200
 Bailee's Interest, 171-172
 Estates for Life, 93, 101, 263
 Estates for Years, 112, 118, 125
 Estates Tail, 22, 23-24, 200
 Land Contracts, 251-258
 Michigan Statutes, 93
 Part of Estate, 25
 Right of Entry, 140-141, 145
- Future Estates. See: Expectant Interests, Executory Interests, Interestia Termini, Remainders, Reversions, Trusts.
- Future Interests. See: Expectant Interests, Executory Interests, Interestia Termini, Possibility of Reverter, Powers, Remainders, Reversions, Rights of Entry, Trusts.
- Gap in Seisin, 262, 263
- Gavelkind, 66
- General Power. See: Powers.
- Gift. See: Chattels Personal, Class Gifts, Powers.
- Gift in Default of Appointment. See: Powers.
- Graves
 Trust for Care of, 418-419, 423-425, 447
- Gross Period. See: Accumulations, Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Heirs
 Meaning of Term, 336-337
 Remainder to, 19, 30-31, 43, 44, 334-338
- Honorary Trusts, 423-425
- Illegal Conditions and Limitations, 152-153, 448-449
- Incidents of Estates. See: Estates for Life, Estates for Years, Estates in Fee Simple, Estates Tail, Interestia Termini.
- Incorporeal Interests. See: Easements, Profits à Prendre.

- Indestructible Future Interests. See: Destructibility, Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Indestructible Trusts. See: Trusts.
- Indirect Restraint on Alienation. See: Restraints on Alienation.
- Ingrossing, 175-178
- Injunction. See: Restraints on Alienation.
- Insurance. See: Accumulations, Rule Against Perpetuities.
- Insurance Policies
 - Restraints on Alienation, 195-196
- Interestia Termini
 - Alienability, 140, 143
 - Defined, 138, 312
 - Devisability, 141, 143
 - Executory Interest, 317
 - Future Estate in Michigan, 323-325
 - Heritability, 141, 143
 - Not Strictly on Estate, 138
 - Permitted by English Law, 311-312
 - Restraints on Alienation. See: Restraints on Alienation.
 - Rule Against Perpetuities, 312, 317-319
- Interest (on Debts), 240-243
- Invalidity, Effect of. See: Accumulations, Estates for Life (Statutory Restrictions on), Illegal Conditions and Limitations, Restraints on Alienation, Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Issue, Possibility of. See: Possibility of Issue.
- Joint-Stock Companies. See: Corporate Stock.
- Joint Tenancy
 - Michigan Statutes, 63, 76, 323
 - Restraints on Partition, 63-65, 75-80
 - Right of Survivorship, 63, 361, 588
 - Right to Partition, 75, 76
- Just Price, 172-174
- Just Wage, 172
- Knight Service, 5
- Laissez Faire, 177-180
- Land Contracts
 - Contract to Make Will, 74-75
 - Dower Barred by Joinder in, 147
 - Forfeiture, 251-258
 - Restraints on Alienation, 59-61, 251-258
 - Rule Against Perpetuities, 407-408
 - Specific Performance, 247
 - Suspension of the Absolute Power of Alienation, 515
 - Vendee's Interest, 247-258
 - alienability, 248, 252
 - devisability, 248
 - equitable estate, 251
 - estate for years, 249, 257
 - heritability, 248
 - restraints on alienation, 59-61, 251-258
 - Vendor's Interest
 - alienability, 248
- Landlord and Tenant. See: Estates for Years.

- Leases. See: Estates for Years.
- Legacy
 - Suspension of the Absolute Power of Alienation, 555
- Lien
 - Suspension of the Absolute Power of Alienation, 555-556
- Life Estate. See: Estates for Life.
- Life Insurance. See: Accumulations, Rule Against Perpetuities.
- Livery of Seisin, 247
- Lives. See: Estates for Life, Honorary Trusts, Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Lives in Being. See: Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Married Women
 - Accumulations, 215, 437, 549
 - Married Women's Act, 57
 - Restraints on Alienation, 206, 426-427
- Maritagium. See: Estates Tail.
- Measuring Lives. See: Estates for Life, Honorary Trusts, Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Mercantile System, 175
- Michigan Law. See also headings for specific legal problems and Table of Statutory and Constitutional Citations. Statutes
 - interpretation, weight of
- New York decisions, 484-485
 - partial adoption of New York, xiii
 - revision of 1846, ix., 213-214
 - gradual piecemeal repeal, xiii
 - single act, 493
- Unique, xiii
- Miller - Tydings Amendment. See: Restraint of Trade.
- Minority. See: Accumulations, Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Monastic Corporations. See: Charities, Mortmain.
- Monopolies, 178, 184
- Moore v. Littell*. See: Rule in *Moore v. Littell*.
- Mortgages
 - Chattel Mortgages
 - assignment by mortgagor, 170-171
- Dower Barred by Joinder in, 147
- Equity of Redemption, 244-247
 - access by creditors, 245
 - alienability, 242, 245-246
 - devisability, 245
 - estate tail in, 245
 - nature of interest, 245-246
 - restraints on alienation, 245-247
 - rule against perpetuities, 407
 - suspension of the absolute power of alienation, 515
- Estate for Years as Substitute, 241

- Foreclosure, 244
- History of, 240-245
- Michigan Law, 250-251
- Mortgagee's Interest
 - alienability, 246
- Mortgagor's Interest. See also: Equity of Redemption.
 - alienability, 242, 245-246
 - legal under lien theory, 248, 251
 - restraints on alienation, 245-247
- Rule Against Perpetuities, 407-408
- Suspension of the Absolute Power of Alienation, 515
- Trust Mortgages, 251
- Mortmain (Conveyances in), 198-199, 410
- Necessaries (Claims for), 209
- Negotiable Instruments
 - Restraints on Alienation, 196
- New York Decisions
 - Weight in Michigan, 484-485
- New York Statutes. See also headings for specific legal problems and Table of Statutory and Constitutional Citations.
 - History of 1829 Revised Statutes, 210
 - Partial Adoption in Michigan, xiii
 - Remoteness of Vesting, 275, 276, 480-483, 506-508, 519
 - Revisers of, 210
 - Revision of 1829
 - revisers' notes, 480-483
- Notes. See: Promissory Notes.
- Object (Power of Appointment), 370
- Occupancy, Restrictions on, 61
- Old Rule Against Perpetuities, 99-100, 264, 272-273
- Options
 - Construction, 404-406
 - Indirect Restraints on Alienation, 399
 - Mortgagee, 246
 - Restraints on Alienation, 87-90, 153, 167
 - Rule Against Perpetuities. See: Rule Against Perpetuities.
 - Suspension of the Absolute Power of Alienation, 89, 401, 513-514
- Partition
 - Michigan Statutes, 76, 79
 - Restraints on, 63-65, 75-80, 147-148
- Partnership (Renewal Lease), 126
- Partnership Shares
 - Restraints on Alienation, 195-196
- Patents, 184
- Payment of Sum in Gross. See: Trusts.
- Penalty Restraints. See: Restraints on Alienation.
- Pension Plan. See: Trusts.
- Period. See: Accumulations, Estates for Years, Rule Against Perpetuities, Suspension of the Absolute Power of Alienation, Trusts.
- Perpetual Freehold, 99-100, 260, 264, 272-273
- Perpetual Trusts. See: Trusts (Duration).

- Perpetuity. See also: Rule
 Against Perpetuities.
 Charitable Corporation, 260,
 409-410
 Evils of, 259-260
 Indirect Restraint on Aliena-
 tion, 259
 Meaning of Term
 estate of ecclesiastical cor-
 poration, 260
 indestructible trust, 260
 perpetual freehold, 260
 remote future interest, 260
 unbarrable entail, 260
 Motives for Creating, xii,
 259
 Perpetual Freehold, 99-100,
 260, 264, 272, 273
 Purposes of, xii, 259
 Strict Settlement, 19, 265-267
 Types of, xi, 260
 future interests, 260
 restraint on alienation, 260
 unbarrable entail, 260
- Personal Property. See: Chat-
 tels Personal, Estates for
 Years.
- Philosophic Realism, xii
- Plats (Michigan Statute), 81
- Political Party (Trust for), 423
- Possession
 Class Gifts
 rule of convenience, 361-
 363
 Not Necessary for Vesting of
 Remainder, 313-314, 330
 Right to, as easement, 394-
 395
 Whether Required for Vest-
 ing of Executory Interest,
 319-320, 330-332, 343
- Possibility of Issue, 309-311,
 491, 573
- Possibility of Reverter
 Alienability, 140-141, 145-
 146, 393
 Chattels Personal, 155, 164
 Defined, 139, 146
 Devisability, 141
 Heritability, 141
 Indirect Restraint on Aliena-
 tion, 392-393
 Interest Subject to May be
 Vested, 316, 332, 343
 Prevents Development of
 Land, 393
 Recognized in Michigan, 146
 Reversion Expectant Upon
 Estate in Fee Simple, 39,
 43, 261, 388
 Rule Against Perpetuities,
 389-390
 Suspension of the Absolute
 Power of Alienation, 514-
 515
 Vesting, 317, 332-333, 343,
 388-390
- Posthumous Child
 Michigan Statutes, 297, 570
 Remainder to, 262
- Postponement of Enjoyment.
 See: Trusts.
- Power of Alienation. See: Sus-
 pension of the Absolute
 Power of Alienation.
- Power of Termination. See:
 Right of Entry.
- Powers
 Absolute Power, 378-379,
 491, 530-531
 Definitions, 370, 516-519
 Donee
 defined, 370, 518
 need have no other inter-
 est, 375
 Donor defined, 370

- Dower, 379
- Effect of Non-Exercise, 453
- General and Special Powers
 - statutory changes in definitions, 377-383, 517
- General Powers, 372-377
 - definition, 283, 517
 - peculiar Michigan definition, 283, 517
- Interest Subject to May be Vested, 316-317, 343, 370
- Life Tenant's Power to Appoint Fee, 70-72, 284, 372-373, 377, 529-530
- Life Tenant's Power to Lease, 517, 527
- Michigan Statutes, 377-379, 516-519, 526-530
 - applicability to chattels personal, 379, 383
 - effect of repeal of suspension statutes, 386
- Mortgagee's Interest as, 407
- New York Statutes, 378-379, 518
- Not Interest in Property, 373
- Object Defined, 370
- Overriding, 520-522, 524-526
- Powers Appendant, 379
- Power in Trust, 517, 518
- Release, 517, 520-522, 524-528
- Revocation, 520-522, 524-525
- Rule Against Perpetuities.
 - See: Rule Against Perpetuities.
- Special Powers, 370-372, 374-375, 385-386, 517, 518
- Suspension of the Absolute Power of Alienation.
 - See: Suspension of the Absolute Power of Alienation.
- Testamentary Powers, 370-372, 374-375, 383-385
 - To Appoint Use by Will, 200
 - To Change Beneficiary. See: Rule Against Perpetuities.
- Pre-Emptive Provisions. See: Restraints on Alienation.
- Presumption of Possibility of Issue, 309-311, 491, 573
- Price Fixing, 173-178, 180-194
- Principal and Income. See: Accumulations, Trusts.
- Prior Limitations. See: Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Privity of Estate, 123
- Probate Order (*Res Judicata*), 567, 601
- Profits, Unearned, 172-175
- Profit-Sharing Plan. See: Trusts.
- Profits à Prendre**
 - Accumulations
 - royalties under mineral lease, 439
 - Appurtenant, 125
 - Divisibility, 118, 149
 - Do Not Prevent Vesting, 394
 - Indirect Restraints on Alienation, 8
- Prohibited Estates for Life.
 - See: Estates for Life.
- Prohibitory Restraints. See: Restraints on Alienation.
- Promissory Notes
 - Restraints on Alienation, 195-196
- Public Welfare Trusts, 419
- Pur Autre Vie. See: Estates for Life.

- Quia Emptores Terrarum
 - Alienation of Part, 81
 - Applicable to Remainder Expectant Upon Estate Tail, 20
 - Enactment, 3
 - Fixed Incidents of Fee Simple, 47
 - Inapplicable to Estates for Life, 94
 - Inapplicable to Estates Tail, 20
 - Made Estates in Fee Simple
 - Alienable, 3, 6-7, 39, 94
 - Principles Basic in Michigan Law, 16
 - Prohibited Fines for Alienation, 136
 - Prohibited Remainder on Fee Simple, 39, 94
 - Prohibited Reversion on Fee Simple, 39, 44, 261
- Qui Tam Actions, 177
- Racial Restrictions, 61
- Realism, xii
- Reception. See: English Law, Rule Against Perpetuities.
- Regrating, 175-178
- Release of Power. See: Powers.
- Remainders
 - Chattels Personal, 163-164, 267-268, 317, 319, 326-327
 - expectant upon estate for years, Michigan statutory restrictions, 327, 494
 - Contingent. See also: Vesting.
 - alienability, 140, 143, 275, 485, 507
 - definition, 262, 312-313, 326, 343
 - destructibility, 59, 101, 262-266, 272, 273, 328-329, 409
 - equitable, 267, 271, 409
 - expectant upon estate for years, 262
 - statutory restrictions, 474, 478, 494
 - expectant upon freehold estate, 262
 - implied condition of survival, 144-145, 351-361
 - invalid in thirteenth century, 19
 - may not suspend absolute power of alienation, 506-513
 - person not ascertainable, 315, 333
 - rule in *In re Coots' Estate*, 354-356
 - trust to preserve, 19, 265-266
 - unborn person, 315
 - validity, 19, 138, 262
 - Creation of, 261-262, 311
 - Cutting Off Prior Estate, 261-262, 324
 - Defined, 312, 324-325
 - Devisability, 141, 143
 - Differences Between Executory Interests and abolished in Michigan, 324
 - Equitable
 - expectant upon estate tail, 267, 268
 - old rule against perpetuities, 264
 - rule in *Whitby v. Mitchell*, 264
 - Estate for Life in, May be Vested, 313-314

- Executed Use, 267
- Executory Interest May Become, 320
- Existed in Thirteenth Century, 19, 157
- Expectant Upon Contingent Prior Estate, May Be Vested, 315
- Expectant Upon Estates for Life, 94, 138
 - on special limitation, 314, 318
 - pur autre vie*
 - statutory restrictions, 478, 494, 500-502
- Expectant Upon Estates for Years, 116, 138, 312-313, 317
 - chattels personal, statutory restrictions, 327, 494
 - Michigan statutory restrictions, 327, 474, 478, 494, 503
 - present estate, 312-313
 - remainder for life, statutory restrictions, 478
 - vested, 263, 312-313
- Expectant Upon Estate in Fee Simple, 39, 261, 318, 324
- Expectant Upon Estate in Fee Simple Conditional, 33
- Expectant Upon Estate on Special Limitation, 262, 314, 318, 332-333
- Expectant Upon Estate *Pur Autre Vie*,
 - statutory restrictions, 478, 494, 500-502
- Expectant Upon Estate Tail, 20, 33-36, 138, 325, 465
 - destructibility, 22, 25-26, 36, 281-282
 - equitable, 267, 268
 - may be vested, 314
 - Michigan law, 33-36, 325
 - on special limitation, 315, 318
 - rule against perpetuities, 281-282
- Expectant Upon Executory Interest, 315, 317, 320
- Following Gap in Seisin, 262
- Heritability, 141, 143
- In Estates for Years, 116, 138, 140, 317
 - expectant upon estate *pur autre vie*, statutory restrictions, 478
- In Uses, 201
- Michigan Statutory Definition, 325
- Permitted by English Law, 311
- Posthumous Child, 262, 297, 570
- Restraints on Alienation. See: Restraints on Alienation.
- Rule Against Perpetuities. See: Rule Against Perpetuities.
- Subject to Condition Precedent, Not Vested, 313
- Subsequent to Executory Interest, 315, 317, 320
- To Heirs, 19, 30, 43, 44, 325, 333-338
- Types Permitted, 138, 261-263
- Unborn Child of Unborn Child, 264, 272-273
- Vested

- alienability, 140, 143
- definition, 326
- destructibility, 101
- estate for life, 314
- expectant upon estate for years, 262, 312-313
- subject to charge, 345
- what is, in Michigan, 343
- Vesting, 311-317, 326-356.
See also: Vesting.
- Rent. See: Accumulations.
- Rents and Profits. See: Trusts.
- Repair Costs. See: Accumulations.
- Resale Price Maintenance. See: Restraints on Alienation.
- Res Judicata (Probate Order), 567
- Restraint of Trade, 178-179, 183-195
- Restraints on Alienation
 - Charities, 85-87
 - Chattels Personal, 155-197
 - bailment, 169-172
 - commercial transactions, 169-197
 - Michigan law summarized, 194-195
 - resale price maintenance contracts, 138-150
 - scope of treatment, 195-197
 - corporate stock, 62, 195-196
 - difference between donative and commercial transactions, 161
 - donative and testamentary transactions, 155, 163-169
 - Michigan law summarized, 168-169
 - penalty restraints, 155, 163-169
 - prohibitory restraints, 165-168
- English law, 155-163, 170-172, 181-183
- equitable interests, 206-207. See also: Trusts.
- intangibles, 195-196
- resale price maintenance contracts, 180-194
- restraints on intestate succession, 166
- restraints on testation, 166
- rules apply to, xii
- shares in business enterprises, 62, 195-196
- spendthrift trusts, 208-209, 229-239, 428, 430-431
- Conditions Precedent
 - effect of invalid, 152-153, 448
- Consequences of Invalidity, 448-449
- Contingent Remainders
 - Michigan law summarized, 153-54
 - penalty restraints, 141-143, 149, 151-153
 - prohibitory restraints, 143, 149, 151-153
- Corporate Stock, 62, 195-196
- Covenant Against Alienation, 53-54, 55, 62, 65, 107, 117-118, 119, 123-124, 129-135
 - specific enforcement, 112, 113, 120-122, 134-135
- Direct and Indirect Distinguished, 7-8

Disabling Restraints. See:
Prohibitory Restraints,

Distinction Between Prohibi-
tory and Penalty Re-
straints, 7-8, 24

Effect of Invalidity, 448

Equitable Interests, 94, 198-
258

cestui que trust's interest,
97, 205-209, 229-239, 428,
430-431

English law, 203-207, 245-
246, 249

equity of redemption, 245-
247

estates for years, 208-209

land contract vendee's in-
terest, 59-61, 252-258

options, 87-90, 153, 167

policy considerations, 96-
97

Equity of Redemption, 245-
247

Estates for Life, 91-110

covenant against aliena-
tion, 107

English law, 93-96

equitable interests, 206-209

expectant estates, 150, 154

Michigan law summarized,
109-110

penalty restraints, 94-107

prohibitory restraints, 93-
94, 99-106, 109-110

tortious alienation, 94, 104

Estates for Years, 111-137

covenant against aliena-
tion, 117-118, 119, 123-
124, 129-134

enforcement by injunc-
tion, 120-122, 135

English law, 112-115

equitable interests, 206-209

expectant estates, 153-154

Michigan law summarized,
134-135

penalty restraints, 42, 113-
137

policy considerations, 134-
137

prohibitory restraints, 112-
113, 120-123, 125, 134-
135

Estates in Fee Simple, 37-90,
488

contract to make will, 73-
75

covenant against aliena-
tion, 53-55, 62, 65

English law, 37-46, 65-69,
75, 81, 83-85, 87-88

equitable estates, 206-207,
208

expectant estates, 148-154
in conveyance to charity,
84-87, 239-240

Michigan law summarized,
65

penalty restraints

against all alienation,
40-41, 48-49, 53-54, 62,
65

limited as to alienees,
41-42, 45-46, 59-61, 65

limited in duration, 45,
46, 48, 50-51, 55-57, 65,
488

pre-emptive options, 87-90,
153, 167, 399

prohibitory restraints, 39-
40, 49-52, 58-59, 65, 260,
488

restraints on division, 81-
83

- restraints on inheritance, 65-69, 166
- restraints on partition, 63-65, 75-80, 147-148
- restraints on testation, 67-75, 166
- tortious alienation, 83
- Estates Tail, 25-26, 83
- Executory Interests
 - Michigan law summarized, 154
 - penalty restraints, 141-143, 149, 151-154
 - prohibitory restraints, 141-143, 149, 151-154
- Expectant Interests, 138-154
 - English law, 141-142
 - equitable, 209
 - Michigan law summarized, 153-154
 - penalty restraints, 143, 148-154
 - prohibitory restraints, 143, 148-154
- Gifts to Charity, 84-87, 239-240
- Illegal is Void, 448
- Indirect Restraints
 - contingent future interests, 8
 - co-tenancy, 8
 - defeasibility, 8
 - easements, 8
 - equitable use restrictions, 8
 - future interests, 8
 - interests in unborn persons, 8
 - option, 399
 - perpetuity, 259
 - possibility of reverter, 392-393
 - profits à prendre, 8
 - Insurance Policies, 195-196
 - Interessia Termini, 142-143, 153-154
 - Land Contracts, 59-61, 251-258
 - Legal Theory, 41-45, 51-52, 96-97
 - Married Women, 206, 426-427
 - Mortgagor's Interest, 245-247
 - Negotiable Instruments, 195-196
 - Not Favored in Michigan, 48, 148
 - Options, 87-90, 153, 167, 399
 - Penalty Restraints. See also: Estates in Fee Simple, Estates for Life, etc.
 - defined, 7, 24
 - do not suspend the absolute power of alienation, 489
 - Perpetuity, 260
 - Pre-Emptive Options, 87-90, 153, 167, 399
 - Prohibitory Restraints. See also: Estates in Fee Simple, Estates for Life, etc.
 - defined, 7, 24
 - suspend the absolute power of alienation, 488
 - void at common law, 485, 488
 - Purpose of Rules Against, xii, xiii, 96-97
 - Relation of Rules Against to Rule Against Accumulations, xi
 - Relation of Rules Against to Rule Against Perpetuities, xi, 489
 - Relation of Rules Against to Statutes Restricting Sus-

- pension of the Absolute Power of Alienation, xi-xii, 489-490
- Remainders
 - contingent
 - Michigan law summarized, 154
 - penalty restraints, 142-143, 148-149, 150
 - prohibitory restraints, 142-143, 149, 151-153
 - vested
 - Michigan law summarized, 154
 - penalty restraints, 51, 142-153, 148-149, 150
 - prohibitory restraints, 51, 143, 148-154
- Resale Price Maintenance Contracts, 180-194
- Restraints on Division, 81-83
- Restraints on Inheritance and Intestate Succession, 65-69, 166
- Restraints on Partition, 63-65, 75-80, 148
- Restraints on Testation, 67-75, 166
- Restrictions on Occupancy, 61
- Reversions
 - Michigan law summarized, 154
 - penalty restraints, 142-143, 149-151
 - prohibitory restraints, 142-143, 149-151
- Rules Against Not Superseded or Modified by Statutes Restricting Suspension of the Absolute Power of Alienation, 488-490
- Scope of Rules Against, xii, xiii
- Spendthrift Trusts, 97, 208-209, 229-240, 428, 430-431, 488
- Suspension of the Absolute Power of Alienation Distinguished, 9, 488-490
- Suspension Statutes do not Validate, 488-490
- Trusts
 - by trustee, 203-204, 207-208, 213, 216-217
 - cestuis' interest, 97, 205-209, 229-240, 428, 430-431, 488
 - penalty restraints, 205-208, 239
 - prohibitory restraints, 97, 205-209, 229-239, 428, 430-431, 488
 - charitable, 84-87
 - married women, 206, 426-427
 - spendthrift trusts, 97, 208-209, 229-240, 428, 430-431, 488
- Vendee's Interest Under Land Contract, 59-61, 251-258
- Vested Remainders
 - Michigan law summarized, 154
 - penalty restraints, 142-143, 148-153
 - prohibitory restraints, 142-143, 148-153
- Restraint on Division, 81-83
- Restraint on Enjoyment. See: Trusts.
- Restraint on Inheritance, 65-69, 166

- Restraint on Intestate Succession, 65-69, 166
- Restraint on Partition, 63-65, 75-80
- Restraint on Testation, 67-75, 166
- Restraint on Termination. See: Trusts.
- Restricted Minority Provision. See: Suspension of the Absolute Power of Alienation.
- Restrictions
 - Equitable, 8
 - chattels personal, 182-183, 189
 - does not prevent vesting, 394
 - land, 182, 183
- Estates for Life. See: Estates for Life.
- Occupancy, 61
- Resubdivision. See: Restraint on Division.
- Retailer, 173, 175-176
- Reversions
 - Alienability, 140, 143
 - Chattels Personal, 164
 - Definition, 388
 - Destructibility, 101
 - Devisability, 141, 143
 - Expectant Upon Estates for Life, 94, 138
 - Expectant Upon Estates for Years, 114-115, 116, 138, 141, 146, 388, 389, 390
 - Expectant Upon Estates in Fee Simple, 39, 43, 94, 261, 388
 - Expectant Upon Estates Tail, 20-23, 25-26, 138, 388
 - Heritability, 141, 143
 - Incidents of, 138, 143
 - In Estates for Years, 138, 140, 143, 146
 - In Uses, 201
 - Michigan Statutory Definition, 388
 - Possibility of Reverter, 139. See also: Possibility of Reverter.
 - Present Estate, 261
 - Restraints on Alienation. See: Restraints on Alienation.
 - Rule Against Perpetuities, 388-389
 - Suspension of the Absolute Power of Alienation, 514-515
 - Tortious Conveyance by Life Tenant, 101
 - Types of, 138
 - Vesting, 261, 388-389
 - Waste, 200
- Rights of Action
 - Alienability, 140-141, 145-146
 - Devisability, 141
 - Discontinued Estate, 139
 - Heritability, 141
- Rights of Entry
 - Alienability, 140-141, 145-146
 - Chattels Personal, 155, 164, 182
 - Destructibility by Discontinuance, 24
 - Devisability, 141
 - Estates for Years, 391
 - Forfeiture for Alienation, 140, 145
 - Heritability, 141
 - Interest Subject to May be Vested, 316-317, 343
 - Invalidity, Effect of, 448-449
 - Of Disseisee, 139, 144-145

- On Breach of Condition, 139-141
- Prevent Development of Land, 393
- Rule Against Perpetuities, 390-393, 407
- Suspension of the Absolute Power of Alienation, 514-515
- Vesting, 391
- Right of Survivorship. See: Class Gifts, Joint Tenancy.
- Royalties, 439
- Rule Against Accumulations. See: Accumulations.
- Rule Against Double Possibilities, 99-100, 264, 272-273
- Rule Against Perpetuities
 - Accumulations. See also: Accumulations.
 - condition precedent to vesting, 433
 - Administrative Delays, 307-309, 346
 - All or Nothing Rule, 363-369, 461
 - Applicable to Michigan Land Since 1949, 279
 - Applicability to Mixed Dispositions of Land and Chattels, 276-277
 - Certainty of Vesting Required, 280, 304-357, 572-573
 - absolute certainty required, 306-311, 572-573
 - accumulations, 433
 - administrative delays, 307-309, 346
 - analogy to suspension statutes, 491, 532, 572-573
 - appointed interests, 376-386, 532, 575
 - ascertainment of measuring lives, 290-293, 581
 - class gifts, 358-369
 - effect of destructibility, 575
 - English law, 304-310
 - facts considered in determining, 304-306, 370-372, 385, 386, 491, 532, 575
 - gift in default of appointment, 370-372
 - power of appointment, 372-376
 - presumption of possibility of issue, 491, 309-311, 573
 - unborn widow, 306-307, 357, 573
 - vesting. See also: Vesting. accumulations, 433
 - when certainty must exist, 304-306, 575
- Certainty that Power Cannot be Exercised so as to Violate, 376
- Certainty that Power Will be Exercisable within the Period, 372-373
- Certainty that Power will not be Exercisable Beyond the Period, 374-376
- Charitable Trusts, 218, 409-423, 447
- Charities
 - accumulations, 435, 447
 - duration, 422-423
 - remoteness of vesting, 409-412, 418-421
- Class Gifts, 358-369, 461, 554
 - all or nothing rule, 363-369, 461, 554
 - rule of convenience, 361-363

- rules same under suspension statutes, 491
- unit rule, 363-369, 461, 554
- vesting, 360-369, 461, 554
- Common-Law Rule Against Accumulations. See: Accumulations.
- Consequences of Violation, 448-476
 - effect on alternative and concurrent limitations, 461-468
 - verbally separate contingencies, 462-465
 - effect on prior limitations, 454-460
 - may become indefeasible, 452
 - not enlarged, 452
 - effect on subsequent limitations, 468-476
 - excision of violating interest, 280, 448-454
 - disposition of property involved, 450-451
 - prior interest may become indefeasible, 452
 - prior interests not enlarged, 452
 - other interests normally valid, 450, 453
- separability, 450, 454-476
 - alternative and concurrent interests, 461-468
 - mixed dispositions of land and chattels, 276-277, 465-467
 - prior interests, 454-460
 - single clause exercising power and disposing of owned property, 467
 - splitting single contingency, 463
 - subsequent interests, 468-476
 - verbally separate contingencies, 462-463
 - substantially the same as consequences of violating statutes restricting suspension of the absolute power of alienation, 453-454, 516
 - violating interest void, 449
 - disposition of property involved, 450-451
- Cy Pres Doctrine, 449-450
- Destructibility, 280-287, 371, 372, 379, 531-538, 572, 575
 - contrasted with suspension statutes, 531-538, 572
 - gifts in default of appointment, 371
 - power of revocation, 379
 - power to change beneficiary, 283
- Does Not Prohibit Remoteness of Possession, 314-315
- Endless Series of Five-Year Terms, 287
- English Background, 259-270
- Exceptions
 - administrative powers, 387
 - charitable limitations, 409-421
 - charitable trusts, 411-421, 447
 - corporate stock, 408
 - destructible interests, 282-287, 371, 372, 379, 532-538
 - devises and bequests to municipal corporations, 413

- equity of redemption, 407
- executory interests, 320-321, 330-332
- executory land contracts, 407-408
- gifts to charitable corporations, 409-411
- interestia termini, 312, 319
- interests expectant upon estates tail, 281-284
- mortgages, 407, 408
- options in leases, 399-407
- possibility of reverter, 389-390
- public welfare trusts, 419
- remainder expectant upon estate for years, 312-313
- right of entry, 390-394, 407
- trusts for care of graves, 418-419, 424-425
- trusts for employees, 409, 419
- Executory Interests, 317-323**
- Honorary Trusts, 423-425**
- Inapplicable to Michigan Land, 1847-1949, 89, 275-276, 327
- Influence on Construction of Instruments, 345, 356-357
- In Force in Michigan Before 1847, 99-100, 270-273
- Interests to Which it Applies, 387-408
 - appointed interests, 387
 - beneficial interest under private trust, 409
 - charitable trusts, 411-421
 - contingent remainders, 272-273, 311-317, 387, 393
 - contracts, 397-398
 - corporate stock, 408
 - destructible interests, 282-287, 371, 372, 379, 532-538
 - dispositive powers, 387
 - equitable contingent remainders, 271
 - equitable future interests, 271, 387
 - equity of redemption, 407
 - estates for the life of a living person, 301-302
 - executory interests, 317-323, 330-332, 387
 - executory land contracts, 407-408
 - expectant interest under trust, 271, 279, 387
 - expectant upon estate tail, 280-282
 - future interests only, 453-454, 460, 539
 - gift to charitable corporation, 409-411
 - interestia termini, 312, 317-319
 - interests expectant upon estates tail, 280-282
 - interests in chattels personal, 276, 387
 - interests of a transferor, 388-396
 - mixed dispositions of land and chattels, 276-277, 465-467, 484
 - mortgages, 407-408
 - options, 88-90, 167, 397-407
 - for perpetual renewal of lease, 400, 405-407
 - in leases, 399-400, 403-407
 - to repurchase, 396
 - present interests, 453-454, 539

- possibility of reverter, 389-390
- powers of appointment, 370, 372-373, 387, 396
- power of revocation, 396
- private interest following trust, 409
- public welfare trusts, 419
- remainders, 271-273, 311-317, 387, 393
 - expectant upon estate for years, 312-313
- reserved option to repurchase, 396
- reserved power of appointment, 396
- reversions, 261, 388-389
- right of entry, 390-394, 407
- summarized, 387
- trust of land
 - direction to convert, 547, 577
 - power of sale, 278
 - power of termination, 548-549
- unissued corporate stock, 408
- vested interests, 274, 539
- Michigan Statute Restoring, 279
- Mixed Dispositions of Land and Chattels, 276-277, 465-467, 484
- Old Rule Against Perpetuities, 99-100, 264, 272-273
- Options, 88-90, 167, 397-407
- Period
 - commencement, 280-287
 - appointed interests, 287, 376-386, 571-572
 - effect of destructibility, 281-287, 371, 372, 379, 532-538, 572, 575
 - escrow, 280
 - general rule, 280-281
 - gifts in default of appointment, 370-372
 - life insurance policy, 283
- computation, 287-303
 - alternative measures, 302-303
 - animal lives, 291, 424
 - ascertainment of measuring lives, 290-293
 - general, 287-291, 301
 - gifts in default of appointment, 371
 - life of child en ventre sa mere, 266, 296-298, 301
 - lives in being, 290-395
 - lives of descendants of Queen Victoria, 292
 - minority of unborn person, 298-299
 - parts of lives, 294-296
 - period of gross, 298-301
 - periods of gestation, 266, 296-298, 301
 - permissible number of lives, 292-293
 - when there are no measuring lives, 298-299
- development, 270-271
- differences from suspension statutes, 571-572
- extinction of issue, 465
- general, 269-270
- strict settlement, 265-267
- Perpetual Freehold, 99-100, 264, 272-273
- Postponement of Enjoyment. See also: Trusts.
 - accumulations, 433-435, 440-441
- Powers, Administrative, 387

- Powers of Appointment, 370-386
 - absolute power of disposition, 491
 - appointed interests, 287, 376-387, 572, 575
 - certainty that power cannot be exercised so as to violate, 376
 - certainty that power will be exercisable within period, 372-373
 - certainty that power will not be exercisable beyond period, 374-376
 - gifts in default of exercise, 370-372
 - powers themselves, 287, 372-376, 387
 - powers which prevent violation, 283-287, 370-372, 376-383
- Power of Revocation, 396
- Presumption of Possibility of Issue, 309-311
- Prohibits Remoteness of Vesting, 311-315
- Purpose, 269-272, 409
- Reception in Michigan, 270-279
- Relation to Rule Against Accumulations, xi, 434
- Relation to Rules Against Restraints on Alienation, xi, 488-490
- Relation to Statutes Restricting Suspension of the Absolute Power of Alienation, xi-xii, 273-278, 453-454, 485-492
- Remainder, 271-273, 311-317, 387, 393
- Remoteness of Possession Not Prohibited, 313-314
- Remoteness of Vesting Prohibited, 314
- Restraints on Enjoyment. See also: Trusts.
 - accumulations, 433-435, 440-441
- Rule Against Double Possibilities, 99-100, 264, 272-273
- Rule in *Whitby v. Mitchell*, 99-100, 264, 272-273
- Separability. See: Consequences of Violation.
- Shifting Interest in Estate for Years, 114
- Stated, 269, 280
- Statutes Restricting Suspension of the Absolute Power of Alienation Were Substitute for, 453, 490-491
- Strict Settlement, 265-267
- Theory and Operation Differs from Statutes Restricting Suspension of the Absolute Power of Alienation, 453-454, 487-489
- Trusts
 - accumulations. See: Accumulations.
 - charitable, 218, 409-423, 447
 - duration. See also: Trusts, 218, 220-221, 418-419, 421-431, 454
 - accumulations. See: Accumulations.
 - charitable trusts, 418-419, 422-423
 - honorary trusts, 423-425

- private trusts, 220-221, 426-431, 454
- public welfare trusts, 419
- trusts for unincorporated societies, 425-426
- for care of animals, 423-425
- for care of graves, 418-419, 423-425
- for employees, 409, 419
- for political parties, 423-425
- for promotion of sports, 423-425
- honorary, 423-425
- of land, 278
- public welfare, 419
- remoteness of vesting, 409-412, 417-421
- restraints on termination, 421-431. See also: Trusts, honorary trusts, 423-425
- private trusts, 224-226, 426-431, 434-435, 551-552.
- trusts for unincorporated societies, 425-426
- Unborn Widow, 306-307
- Unit Rule, 363-369, 461
- Vesting. See also: Certainty of Vesting Required, Vesting.
- Michigan decisions, 1847-1949, applicable, 327
- Rule in *Clafin v. Clafin*, 224-226, 421-431, 434
- Rule in *In Re Coots' Estate*, 354, 356
- Rule in *Moore v. Littel*, 333-343
- Rule in *Shelley's Case*, 19, 30-31, 43, 44, 325, 333-338
- Rule in *Whitby v. Mitchell*, 99-100, 264, 272-273
- Rule of Convenience, 361-363, 365-369, 494-495
- Sales. See: Chattels Personal.
- Security Transactions. See: Land Contracts, Mortgages.
- Seisin. See: Gap in Seisin, Right of Entry.
- Separability. See: Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Servitudes. See: Easements, Equitable Restrictions, Profits à Prendre.
- Settlement. See: Strict Settlement, Trusts.
- Settlor. See: Trusts.
- Severability. See: Separability.
- Shares of Stock: See: Corporate Stock.
- Shelley's Case. See: Rule in Shelley's Case.
- Shifting Executory Devise. See: Executory Interests.
- Shifting Use. See: Executory Interests.
- Sinking Fund. See: Accumulations.
- Societies (Unincorporated)
 - Capacity to Hold Legal Title, 413
 - Trusts for, 413, 425-426
 - duration, 425-426
 - restraints on termination, 425-426
 - validity, 425-426
- Special Limitation, 139. See also: Possibility of Reverter, Rule Against Perpetuities, Vesting.
- Estate for Life, 314, 318

- Estate for Years, 312-313
- Interest Following May be Vested, 332-333
- Interest Subject to May be Vested, 316-317, 332-333, 343-344
- Special Occupant, 92
- Special Power. See: Powers.
- Spendthrift Trusts. See: Trusts.
- Sports (Trust for Promotion of), 423-424
- Springing Executory Devise. See: Executory Interests.
- Springing Use. See: Executory Interests.
- Stock. See: Corporate Stock.
- Stock Bonus Plan. See: Trusts.
- Stock Dividends. See: Accumulations.
- Strict Settlement, 19, 265-267
- Subdivision. See: Plats, Restrictions on Alienation (Restrictions on Division).
- Subinfeudation, 1-3
- Subsequent Limitations. See: Rule Against Perpetuities, Suspension of the Absolute Power of Alienation.
- Substitution, 1
- Successive Estates for Life. See: Estates for Life.
- Summary Proceeding for Possession, 126
- Support, Trusts for, 208-209
- Surviving. See: Construction of Instruments.
- Survivor. See: Estates for Life (Statutory Restrictions on), Suspension of the Absolute Power of Alienation (Period).
- Survivorship
 - Class Gifts, 360-361
 - When Required, 144-145, 350-361
- Suspension of Absolute Ownership, 478, 483, 508
- Suspension of the Absolute Power of Alienation
 - Administrative Delays, 573-574
 - Certainty, 572-576
 - absolute certainty required, 572-574
 - administrative delays, 573-574
 - analogy to rule against perpetuities, 491, 532, 572-575
 - ascertainment of measuring lives, 581-582
 - effect of destructibility, 575-576
 - facts considered in determining, 491, 532, 571-576
 - presumption of possibility of issue, 311, 491, 573
 - unborn widow, 573
 - when certainty must exist, 575-576
- Charitable Corporation, 509, 515-516
- Charitable Trusts, 414-423, 509, 515-516
- Chattels Personal, 276-277
 - Michigan statutes inapplicable, 483-484
 - mixed dispositions of land and chattels, 276-277, 465-467, 484
- Class Gifts
 - class as donee of power, 520-521
 - class as objects of power, 521-522

- class which may include members not in being, 505-506
- class whose members cannot be ascertained, 505-506
- rules same as under rule against perpetuities, 491
- Consequences of Violating Statutes, 448-476, 516
 - effect on alternative and concurrent limitations, 461-468, 516
 - effect on prior limitations, 454-460, 516
 - effect on subsequent limitations, 468-476, 516
 - excision of violating interest, 448-454, 516
 - power which violates, 520
 - separability. See: Separability.
 - substantially the same as consequences of violating rule against perpetuities, 453-454, 516
 - trusts, 554-555
- Destructibility. See: What Prevents Suspension.
- Differences between New York and Michigan Statutes, 483-484
- Equitable Conversion, 277-278, 484, 523-538, 546-548
- Estate for Life of Survivor of Four Persons, 107-108, 594-595
- Estates for Years, 276, 484
- Exceptions to Statutory Restrictions on
 - alienable contingent future interest, 506-513
 - charities, 418-419, 515-516, 569
 - devises and bequests to municipal corporations, 413
 - infant unable to alienate, 515
 - insane person unable to alienate, 515
 - land contract, 515
 - mortgage, 515
 - options, 88-89, 400-407, 513-514
 - personal incapacity to alienate, 515
 - possibility of reverter, 514-515
 - reversions, 514-515
 - rights of entry, 514-515
 - trusts for employees, 409, 419
 - trusts for care of graves, 418-419, 424-425, 569
 - trusts for public welfare purposes, 419, 569
 - vested legal future interest, 504-506
- Future Interests. See also: What Suspends.
 - number of prior interests not limited, 580
 - number of takers not limited, 580
 - number of takers of prior interests not limited, 580
- Infant Unable to Alienate, 515
- Insane Person Unable to Alienate, 515
- Interest Which Does Not Suspend May be Void as Restraint on Alienation, 577

- Interest Which Does Not Suspend May be Void under Rule Against Perpetuities, 577
- Land Contract, 515
- Meaning of the Phrase, 485-490
- Mixed Property, 276-277, 465-467, 484
- Mortgage, 515
- Options, 88-89, 400-407, 513-514
- Period of Permissible Suspension, 570-612
 - administrative delays, 573-574
 - alternative measures, 609-612
 - commencement, 571-572
 - effect of destructibility, 532-549, 572-576
 - interests created by exercise of power, 528-532, 572-576
 - settlor also beneficiary of trust, 568-569
 - differences from rule against perpetuities, 571
 - effect of destructibility, 532-549, 572-576
 - interests created by exercise of power, 528-532, 572-576
 - minority of unborn person, 571, 604-608
 - periods in gross, 571, 608-612
 - alternative measures, 609-612
 - part of life distinguished, 579
 - restricted minority provision, 571, 604-608
 - separability, 450, 454-476, 602-604
 - separate conveyances, 590-591
 - two lives in being, 576-604
 - ascertainment of measuring lives, 581-582
 - child end ventre sa mere, 579
 - life of survivor of group, 107-108, 582-602
 - lives of animals, 579
 - lives of corporations, 579
 - lives of persons who take no interest, 579-580
 - lives of plants, 579
 - parts of lives, 579
 - separability, 602-604
 - what is a life in being, 576-580
- Personal Incapacity to Alienate, 515
- Possibility of Reverter, 514-515
- Powers
 - absolute power, 378-380, 491, 524, 529-531
 - interests created by execution of, 528-532, 571-576
 - powers which cause suspension, 516-528
 - powers which prevent suspension, 277-278, 504, 524-528, 532-549
- Present Interest in Trust, 277, 539
- Public Welfare Trusts, 419
- Purpose of Statutes Restricting, 479-483
- Relation of Statutes Restricting to Rule Against Perpetuities, xi, xii, 273-278, 453-454, 485-490

- Requirement of Certainty.
See: Certainty.
- Restraints on Alienation Distinguished, vii, 9, 109, 488-490
- Reversion, 514-515
- Right of Entry, 514-515
- Scope and Arrangement of Discussion of, 490-492
- Separability, 450, 454-476, 602-604
 - alternative and concurrent interests, 461-468
 - concurrent trusts, 461-462, 602-604
 - may validate all interests, 602-604
 - may validate separable interests, 450, 453-476, 602-604
 - mixed disposition of land and chattels, 276-277, 465-467, 484
 - parts of single trust, 460
 - prior interests, 454-460
 - single clause exercising power of disposing of owned property, 467
 - subsequent interests, 468-476
- Separate Conveyances, 590-591
- Statutes Restricting, xi, xii, 89, 108-109, 217, 273-278, 380, 414, 429, 477-484, 504
 - adopted in thirteen states, 480
 - enactment, 477
 - repeal, 218, 279, 380, 429, 479
 - revisers' notes, 480-483
- Suspension of Vesting Distinguished, 485-488, 506-513, 520
- Trusts. See also: What suspends.
 - charitable, 414-421, 509, 515-516, 569
 - for care of graves, 418-419, 424-425, 569
 - number of beneficiaries not limited, 497, 580
 - public welfare trusts, 419, 569
- Vesting. See also: Vesting.
 - rules same as under rule against perpetuities, 491
 - unvested future interest may not suspend, 506-513
 - vested legal interest does not suspend, 504-506
- What Prevents Suspension
 - destructibility, 532-549, 572-576
 - differences from rule against perpetuities, 532-538
 - future interests, 533-538
 - trusts, 539-549
 - direction to convert, 277-278, 484, 523, 538, 546-548
 - persons in existence who can convey a fee, 506-507, 510-513
 - power of court to order sale of fee, 504
 - power of sale, 231, 277-278, 542-546
 - power to convert, 542-549
 - power to override power, 520, 522, 524-526
 - power to release power, 520, 522, 524-528

- power to revoke power, 520, 522, 524-525
- power to terminate trust, 548-549
- powers which prevent, 277-278, 520-528, 530-549
- settlor also beneficiary of trust, 568-569
- What Suspend
 - administrative delays, 574
 - annuities, 555-569
 - Michigan law summarized, 567-568
 - charities, 414-419, 509, 515-516
 - class gifts, 491, 505, 506, 554
 - conditions precedent, 506-513
 - contingent remainder, 504-516
 - destructible trusts, 539-549
 - equitable charge, 555-556, 558, 560, 566-567
 - equity of redemption, 515
 - estate for years, 276, 484
 - executory interest, 504-516
 - indestructible future interests, 275 454, 504-516
 - class which may include members not in being, 505
 - corporation not in being, 504
 - contingent interest may not, 506-513
 - person not in being, 504-505, 553
 - person not presently ascertainable, 505-506, 553
 - under trusts, 553
 - unvested interest may not, 506-513
 - vested legal interest does not, 504-506
- indestructible trusts, 217-218, 274-275, 277, 429, 454, 460, 486-487, 549-569
 - annuities, 555-569
 - care of graves, 419, 423-425
 - charitable, 414-421, 509, 515-516
 - for payment of a sum in gross, 555-569
 - for receipt of the rents and profits of land, 277, 539, 550-555
 - future interests under, 506-516, 553
 - not anticipated by revisers, 486
 - present interests under, 277, 539
 - public welfare trusts, 419
 - settlor as beneficiary, 568-569
 - to pay annuities, 555-569
 - to satisfy a charge, 555-558
 - to sell lands for the benefit of creditors, 556, 558
 - to sell, mortgage or lease for the benefit of legatees, 555-558
- infant's interest does not, 515
- interests created by exercise of powers, 528-532

- land contract, 515
- legacy, 555-556
- lien, 555-556
- lunatic's interest, 515
- mortgage, 515
- mixed dispositions of land and chattels, 276-277, 465-467, 484
- options, 88-89, 400-407, 513-514
- penalty restraints on alienation, 489
- personal incapacity to alienate, 515
- possibility of reverter, 514-515
- powers which cause suspension, 516-528
 - administrative powers, 522-523
 - beneficiaries not in being or not ascertainable, 521-523
 - donee not in being or not ascertainable, 520-521
 - power to convert, 523
 - power to create a trust, 524-526
 - power to sell, lease, charge or encumber, 522-523
 - powers which violate rule against perpetuities, 519-520
- present interest under trust, 277, 454, 539
- prohibitory restraint on alienation, 488-489
- reversions, 514-515
- right of entry, 514-515
- unvested future interests, 275, 506-513
- vested interests, 274-275, 504-506
- Taltarum's Case. See: Estates Tail.
- Taxes. See: Accumulations.
- Tenancy by the Entireties. See: Estates by the Entirety.
- Tenancy in Common
 - Restraints on Partition, 75-80
 - Right to Partition, 75-76
- Tenant for Years. See: Estates for Years.
- Tenants in Chief, 3
- Term. See: Accumulations, Estates for Years, Trusts, Suspension of the Absolute Power of Alienation.
- Termination. See: Trusts.
- Testamentary Power. See: Powers.
- Testation. See: Restraints on Alienation, Wills.
- Tortious Conveyances, 26, 83-84, 94, 101, 104
- Trade. See: Restraint of Trade.
- Trade Associations, 181
- Treason (Effect of Attainder), 3, 22, 23-24, 200
- Trustee. See: Trusts.
- Trusts
 - Access by Creditors, 206-209, 228-238, 428, 430-431
 - Accumulations. See: Accumulations.
 - Alienability
 - by trustee, 203-204, 207-208, 213, 216-217, 221-227, 231-232, 277, 428, 539
 - common-law rules, 203-204, 207-208, 216-217, 231-232

- Michigan statutes, 213-216-217, 221-227, 277, 428, 539, 550-551
- New York statutes, 213, 221-222, 428-429, 550-551
- trusts of chattels personal, 231-232, 327
- trusts of land, 230-231, 327
- will, 221
- cestui's interest, 5-6, 205, 208-209, 212, 216-217, 220, 227, 230-232, 277, 380, 428, 485-486, 539, 543, 550-552, 568
- common-law rules, 5-6, 205, 208-209, 216, 232
- Michigan statutes, 212, 220, 227, 230-232, 277, 380, 429, 485-486, 539, 543, 550, 568
- New York statutes, 212, 230, 428, 539, 550
- settlor also beneficiary, 568-569
- spendthrift trust, 208-209, 229-240, 428, 430-431
- trust for support, 208-209
- trust of chattels personal, 230-232, 327
- trusts of land, 230-232
- Applicability of Statutory Restrictions on Estates for Life, 493-494, 497, 501-502
- Beneficiary. See: Cestui que Trust.
- Bona Fide Purchaser, 204, 207-208, 221
- Cestui in Possession, 216
- Cestui Que Trust
 - alienability of interest. See: Alienability.
 - animal, 423
 - ascertainability, 409-412, 417-421
 - charitable trust, 412, 417-421
 - definiteness, 417-421
 - definition, 203
 - interest of life beneficiary not life estate, 493-494, 497
 - no limit on number of, 497
 - restraints on alienation. See: Restraints on Alienation.
 - unincorporated societies, 425-426
- Charitable. See: Charities.
- Chattels Personal
 - applicability of Michigan statutes, 230-232, 327
- Definiteness of Beneficiaries, 417-421
 - charitable trusts, 417-421
 - public welfare trusts, 419
 - trusts for care of graves, 418-419, 447
 - trusts for employees, 409, 419, 447
- Definiteness of Purpose, 414-421
 - charitable trusts, 414-421
 - public welfare trusts, 419
 - trusts for care of graves, 418-419, 447
- Destructibility, 268, 409 426-431, 532-549, 572, 575-576. See also: Termination.
- Device for Creating Expectant Interests in Chattels, 160

- Disability and Death Benefit Plans, 409, 419, 447
- Discretionary Trust, 238
- Dower, 204
- Duration, 216-221, 421-431, 434-435, 551-555, 570-612
 - accumulations. See: Accumulations.
 - charitable trusts, 218, 422-423
 - honorary trusts, 423-425
 - married women, 426-427
 - Michigan law summarized, 428-431
 - private trusts, 224-227, 426-431, 434-435, 551-555, 570-612
 - public welfare trusts, 419
 - rule against perpetuities, 218, 418-419, 421-431, 454
 - suspension of the absolute power of alienation. See: Suspension of the Absolute Power of Alienation.
 - trusts for care of graves, 418-419, 423-425
 - trusts for employees, 409, 419
 - trusts for unincorporated societies, 415, 425-426
- Equitable Charge Distinguished, 559
- Estates for Life
 - applicability of statutory restrictions, 493-494, 496, 501-502
- Estates for Years (passive), 216
- Estates in, 203
- Estates Tail, 267
- Exceptions to Statute of Uses, 5, 202
- Expectant Interests (destructibility), 268, 409
 - For Care of Animals, 423-425
 - For Care of Graves, 418-419, 423-425, 447
 - For Employees, 409, 418-419, 447
 - For Religious Societies, 415
 - For Support, 208-209
 - For Unincorporated Societies, 415, 425-426
- History of, 202-205
- Honorary Trust, 423-425
- Interest of Life Beneficiary Not Estate for Life, 493, 497
- Interest of Trustee May be Estate for Life, 493-494, 501-502
- Michigan Statutes, 210-216, 228-231, 277, 414, 493-494
 - applicability to trusts of chattels personal, 230-231, 327
- New York Statutes, 210-213, 229-230, 428-429, 551, 557
- Pension Plan, 409, 419, 447
- Perpetuity (indestructible trust), 260
- Postponement of Enjoyment, 216, 224-227, 232-233, 347, 427-431, 440-441, 443, 551-552, 563
- Principal and Income. See: Accumulations.
- Profit-Sharing Plan, 409, 419, 447
- Public Welfare Trusts, 419
- Purposes for Which Permitted, 212-215, 218-221, 414, 549

- accumulations, 435-437
 - charity, 414-421
 - definiteness, 416-421
 - Michigan statutes, 214-215, 418-419, 549
- Restraints on Alienation.
 - See: Restraints on Alienation.
- Restraints on Enjoyment.
 - See: Postponement of Enjoyment.
- Restraints on Termination, 224-227, 421-431, 434-435, 550-552, 563
 - accumulations. See: Accumulations.
 - charitable trusts, 218, 422-423
 - honorary trusts, 423-425
 - married women, 426-427
 - private trusts, 224-227, 426-431, 434-435, 551-552
 - rule against perpetuities, 218, 418-419, 421-422, 453-454
 - rule in *Clafin v. Clafin*, 224-227, 421-431, 434
 - spendthrift trusts, 232-235, 428, 430-431
 - trusts for care of graves, 418-419, 423-425
 - trusts for employees, 409, 419
 - trusts for unincorporated societies, 415, 425-426
- Rule Against Perpetuities.
 - See: Rule Against Perpetuities.
- Rule in *Clafin v. Clafin*, 224-227, 421-431, 434
- Separability. See: Rule Against Perpetuities (Consequences of Violation),
 - Suspension of the Absolute Power of Alienation.
- Settlor (also beneficiary), 568-569
- Spendthrift Trusts, 96-97, 208-209, 229-239, 428, 429-431, 488-489
 - Michigan law, 229-239, 429-431
 - policy considerations, 238-239
 - termination, 429-431
- Statute of Charitable Uses, 12
- Statute of Uses, 5, 12, 139, 201, 202
- Stock Bonus Plan, 409, 419, 447
- Suspension of the Absolute Power of Alienation. See: Suspension of the Absolute Power of Alienation.
- Termination, 216, 224-227, 232-236, 426-431, 434, 550-552, 563
 - accumulations, 434-435, 443
 - English law, 426, 433
 - presumption of possibility of issue, 309-310
 - restraints on. See: Restraints on Termination.
 - rule in *Clafin v. Clafin*, 224-227, 421-431, 434
 - spendthrift trusts, 427-428, 430-431
- To Preserve Contingent Remainders, 19, 265-266
- Trustee
 - alienation by. See: Alienability.
 - definition, 203
 - devisability of interest, 221

- dower in interest, 204
- heritability of interest, 221
- interest may be estate for life, 493-494, 501-502
- Trust Mortgages, 251
- Trust Mortgages, 251
- Two Lives in Being. See: Suspension of the Absolute Power of Alienation.
- Two Lives Statutes. See: Estates for Life (Statutory Restrictions on), Suspension of the Absolute Power of Alienation, Remainders.
- Unborn Persons. See also: Estates for Life, Expectant Interests, Rule Against Perpetuities, Suspension of the Absolute Power of Alienation, Vesting.
- Alienability of Interests, 7
- Unborn Widow, 306-307, 573
- Unique Chattels. See: Chattels Personal.
- Unit Rule. See: Class Gifts.
- Use and Occupation. See: Chattels Personal (History of Law of).
- Use Restrictions. See: Equitable Restrictions.
- Uses
 - Alienability, 4, 201
 - Alienation by Feoffee to, 200-201, 203
 - Devisability, 201
 - Enforcement in Equity, 200-201
 - Estates in, 201, 268
 - Expectant Interests in, 201, 268
 - History of, 198-202
 - Raised by Bargain and Sale, 247
 - Remaniders in, 267
 - Usury. See: Interest.
- Vesting, 311-357
 - Accumulation Condition Precedent to, 433
 - Administrative Delays, 307-309, 346
 - Bearing on Restraints on Alienation, 142-143, 149, 153-154
 - Certainty of Enjoyment not Necessary to, 314, 343-344
 - Certainty of Possession not Necessary to, 314, 343-344
 - Certainty of Required by Rule Against Perpetuities. See: Rule Against Perpetuities.
 - Charitable Corporations, 409-411
 - Charitable Trusts, 411-421
 - Chattels Personal, 319-320, 326-327
 - Class Gifts, 358-369, 554
 - Condition Precedent Prevents, 312-313, 333, 344
 - Construction of Instruments, 339, 343-357
 - Constructional Preference for Early, 339, 345, 348, 354
 - Contingency as to Person or Event, 333-343
 - Defeasibility Does Not Prevent, 316-317, 343, 344-345, 349, 363-369
 - Easement Does Not Prevent, 394
 - English Law, 311-323

- executory interests, 317-323
- remainders, 311-317
- Equitable Restriction Does Not Prevent, 394
- Estates for Life, 313-314
- Estates for Years
 - suspension of absolute ownership, 478, 508
- Executory Interests, 317-332, 343
 - certain to become possessory, 319-321, 330-332
 - cutting off or following estate for years, 312-313
 - deferred possession, 317-323, 330-332, 343
 - English law, 317-323
 - Michigan law, 326-332
 - non-possessory interests, 320
 - not contingent, 319-320
- Gift in Default of Appointment, 370-372
- Implied Condition of Survivorship, 144-145, 354-356
- Interest Subsequent to Executory Interest, 315, 317, 320
- Michigan Law, 323-357
- Michigan Rules Differ from Common Law, 154
- Michigan Statutes, 326
 - punctuation, 336
- Options, 398
- Possession Not Required for Remainder, 313-315, 330
- Possession Required for Executory Interest, 317-323, 330-333, 343
- Possibility of Reverter, 316-317, 332-333, 343-344, 389-390
- Power of Appointment Does Not Prevent, 316-317, 343-344, 370
- Presumption of Possibility of Issue, 309-311
- Profit à Prendre Does Not Prevent, 394
- Remainder, 311-317, 326-357
 - condition precedent prevents, 312-313, 333, 334
 - certain to occur, 313
 - condition subsequent does not prevent, 316-317, 344-345
 - conditional on preceding estate terminating in a particular manner, 313-314
 - defeasibility does not prevent, 316-317, 343-345
 - class gift exception, 363-365
 - deferred possession does not prevent, 313-317, 330, 343
 - English law, 311-317
 - estate for life, 314
 - executory limitation does not prevent, 316-317, 343-344
 - expectant upon estate for life on special limitation, 314
 - expectant upon estate for years, 262-263, 312-313
 - Michigan statutory requirement, 474, 478
 - expectant upon estate tail on special limitation, 315
 - heirs of living person, 316, 333-338

- Michigan law, 326-357
 summarized, 343
 peculiar class gift rule,
 363-365
 power of appointment
 does not prevent, 316-
 317, 343-344, 370
 remainderman not in be-
 ing or not ascertainable,
 315-416, 333
 rule in *In re Coots' Estate*,
 354-356
 rule in *Moore v. Littel*,
 333-343
 special limitation does not
 prevent, 316-317, 332-
 333, 343-344
 subject to charge, 345
 subsequent to executory
 interest, 320
- Remoteness of
 New York statutes, 275-
 276, 484
 Rule Against Perpetuities.
 See: Rule Against Perpe-
 tuities.
- Reversion, 261, 388-389
- Right of Entry, 316-317, 332-
 333, 343-344, 390-391
- Rule Against Perpetuities.
 See also: Rule Against Per-
 petuities.
 Michigan decisions, 1847-
 1949, applicable, 327
 rules same under suspen-
 sion statutes, 491
 Rule in *In re Coots' Estate*,
 354-356
 Rule in *Moore v. Littel*, 333-
 343
- Strict Settlement, 265-266
- Subject to Executory Inter-
 est, 316-317, 343-344
- Survivorship (when re-
 quired), 350-361
- Suspension of Absolute
 Ownership, 478, 508
- Suspension of Not Suspen-
 sion of the Absolute Power
 of Alienation, 506-513,
 519-520
- Suspension of the Absolute
 Power of Alienation. See
 also: Suspension of the Ab-
 solute Power of Aliena-
 tion.
 rules same as under rule
 against perpetuities, 491
 suspension of vesting not
 suspension of the abso-
 lute power of alienation,
 506-513, 519-520
- Trusts. See also: Rule
 Against Perpetuities.
 cestui's interest
 charitable trust, 411-412
 trustee's estate
 charitable trust, 411-412
 Unborn Widow, 306-307, 573
- Violation, Effect of. See: Ac-
 cumulations, Estates for Life
 (Statutory Restrictions on),
 Rule Against Perpetuities,
 Suspension of the Absolute
 Power of Alienation.
- Warranty (Barring Entail), 23
- Waste, 93, 12
- Wasting Assets. See: Accumu-
 lations.
- Whitby v. Mitchell. See: Rule
 in Whitby v. Mitchell
- Wholesaler, 173
- Will Contest (Compromise),
 234

Wills

Accumulations. See: Accumulations.

Chattels Personal, 6, 159

Class gifts. See: Class Gifts.

Construction. See: Construction of Instruments.

Contract to Make, 73-76

Effective Date, 280, 571-572

Equity of Redemption, 245

Estates for Life, 92

Estates for Years, 6, 111-112

Estates in Fee Simple, 3-5, 67

Estates Tail, 23-24, 67

Executory Interests, 141, 143

Expectant Interests, 141, 143

Interessia Termini, 141, 143

Land, 3-5, 23-24, 67, 111-112, 141, 143, 201, 221

cestui que use, 200, 201

Michigan statutes, 67, 143

trustee, 221

Land Contracts, 248

Mortgages, 245

Possibility of Reverter, 141

Powers. See: Powers.

Remainders, 141, 143

Restraints on Testation, 67-75, 166

Reversions, 141, 143

Right of Action, 141

Rights of Entry, 141

Rule Against Perpetuities. See: Rule Against Perpetuities.

Statutes, 67, 143

Suspension of the Absolute Power of Alienation. See: Suspension of the Absolute Power of Alienation.

Testamentary Powers, 370-372, 374-375, 383-386, 530-531

Trustee, 221

Trusts. See: Trusts.

Uses, 200, 201

Worthier Title, Doctrine of, 19